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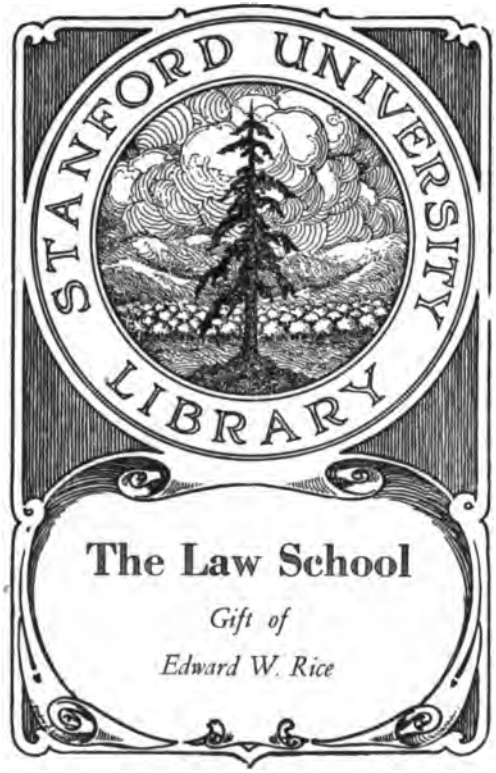
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AND IN THE

KING'S BENCH,

FROM

THE 5TH TO THE 8TH YEARS OF GEORGE II.,

DURING WHICH TIME THE

LORDS RAYMOND AND HARDWICKE WERE LORD CHIEF JUSTICES OF ENGLAND.

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William Kelynge, the Editor of theſe Reports, was admitted a Student of the Inner Temple, 25th June, 1726, and was called to the Bar 19th November, 1731.

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A

REPORT

OF

CASES

IN

Chancery, the *King's Bench*, &c.

In the Fourth, Fifth, Sixth, Seventh, and Eighth Years of his late Majesty King GEORGE the Second; during which Time Lord *King* was Lord High Chancellor of *Great Britain*, and the Lord *Raymond* and Lord *Hardwicke* were Lord Chief Justices of England.

To which are now added about Seventy Additional CASES.

By WILLIAM KELYNGE,
of the *Inner Temple*, Esq.

LONDON:
Printed by His Majesty's Law Printer; for JOHN WORRALL, at the *Dove*, in *Bell Yard*, near *Lincoln's Inn*.
MDCCLXIV.

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Cases

Caſes adjudged in Chancery.

Dobbins *verſus* Bland.

In Canc' coram King *Chancellor*, June 13. 1730. 4 *Geo.* II.

Bill for Payment of a Legacy againſt Defendant as Executor.

THIS was a Bill, brought for Payment of a Legacy, againſt the Defendant as Executor of *John Hyett*. *John Hyett*, by Will 5 *Sept.* 1719. *inter al'*, deviſed unto the Plaintiff *Elizabeth*, by the Name and Deſcription of his Grand-daughter *Elizabeth Hyett*, the Sum of 2500*l.* to be paid her when ſhe ſhould attain her Age of twenty-one Years, or be married with the Conſent of his Executors or the Survivor of them; and ſuch Conſent to be teſtified in Writing under their Hands, and not otherwiſe.

The Teſtator alſo gave and bequeathed unto the Plaintiff *Elizabeth* the annual Sum of 100*l.* for the Term of five Years, to commence from and after her Marriage with the Conſent of his ſaid Executors and Truſtees,

as aforesaid, if the Plaintiff should so long live. The first of which said annual Payments he willed should begin and be made unto the Plaintiff at the Expiration of the first Year after such her Marriage with Consent, as aforesaid. The Plaintiff *Elizabeth* intermarried with the Plaintiff her Husband after she attained the Age of twenty-one Years; and the Executors paid the Legacy of 2500*l.* because the Words as to that were in the Disjunctive, *viz.* when she attained her Age of twenty-one Years, or be married with the Consent of his Executors. So that the Assent of the Executors was not necessary, in case she married under the Age of twenty-one Years.

And the Question was now only as to the 100*l.* for five Years; and it was insisted, she having married the Plaintiff without the Consent of the Executors, she should never be intitled to the said 100*l.* for five Years. Tho' in this Case there is no Limitation over in case she married without Consent; yet this is not a Restriction only *in terrorem*, but is a Condition precedent; and a Court of Equity cannot dispense with the Non-performance of a Condition precedent. The Words are, "To commence from and after such her Mar-"riage with Consent of his said Executors "and Trustees, as aforesaid"; and that has Reference to the former Words where the Consent is directed to be testified in Writing.

(2.)

King Chancellor inclined to be of Opinion, That the Plaintiff *Eliz.* by her Marriage without Consent, *&c.* had lost this Legacy of 100*l.* for five Years, and that this was a Condition

dition precedent; but the Residuary Legatee, who was an Infant and Heir at Law, not being before the Court, it was ordered to stand over. *Vide* 2 *Vern.* 293. *Garrett & Ux'* versus *Pritty* & al'. *Note*; This is not a Gift defeasible on a Condition subsequent, but to commence upon the Performance of an Act which was to be performed. 2 *Vern.* 339. 2 *Vern.* 572.

Goodall *versus* Rivers *& al'*, 4 Geo. II.

THIS was a Bill brought by the Plaintiff, who married one of the Daughters of Sir *Thomas Rivers*, wherein several other Daughters of Sir *Thomas Rivers* were Plaintiffs also, and Sir *George Rivers* and the surviving Trustee (for a Term of Years comprised in Sir *George Rivers*'s Marriage-Settlement,) were Defendants.

Bill to oblige the surviving Trustee to pay Portions.

And the Bill was to oblige the surviving Trustee to pay the Plaintiffs their Portions, with Interest from the Time they became payable, and also a considerable Arrear which was allotted to them for Maintenance, by Sale of a Term during the Life of the Defendant Sir *George Rivers* their Father. The Case was as follows: Sir *George Rivers*, after his Marriage with Dame *Dorothy* his Wife, executed certain Articles which were recited to be made in Pursuance of a verbal Agreement between them two before Marriage, and by the said Articles agreed to make a Settlement of certain Lands to the following Uses, *viz.*

To the Use of Sir *George* for Life; Remainder to Trustees therein named, during the Life of Sir *George*, to preserve contingent Remainders; Remainder to Dame *Dorothy* his Wife for Life for her Jointure; Remainder to the first and every other Son in Tail Male; Remainder to Trustees for 500 Years; Remainder in Fee to Sir *George Rivers*. And a Marriage-Settlement was afterwards made in Pursuance of the Articles, and the Trust for 500 Years was declared as follows, *viz.* That the said Term of 500 Years was so limited in Trust, that in Default of Issue Male of the said Sir *George* by Dame *Dorothy* his Wife, the said Trustees, their Executors, *&c.* should and might, either by and out of the Rents and Profits of the said Premisses so limited after the Commencement of the said Term of 500 Years, or else by Lease or Sale, or Mortgage of the same, or any Part thereof, (except a Particular Part therein excepted,) for 500 Years, or any lesser Term, when and in such Manner as the said Trustees or the Survivor of them, his or their Executors, should think fit, to raise the several Sums for the Portions, and for Maintenance and Education of such Daughter or Daughters, as herein after expressed, (that is to say) if there be but one such Daughter that should attain the Age of twenty-one Years, or marry, the Sum of 4000*l.* and if two, 5000*l.* and if three or more Daughters which should attain that Age, or be married, 6000*l.* equally to be divided amongst them; and also the yearly Sums therein after mentioned for their Maintenance and Education; and

(8.)

and the ſaid Portions to be paid them at nineteen Years, or when they ſhould be married, with Intereſt at 4*l. per Cent.* for their Maintenance from the Death of Sir *George* or Dame *Dorothy*, which ſhould firſt happen, until their Portions became payable.

Sir *George Rivers* had Iſſue two Sons by his Wife, and both the ſaid Sons are dead without Iſſue Male, the youngeſt of which died 1727. ſo that now here is a Term veſted in the Truſtees; for the Term was limited to them upon Failure of Iſſue Male. The Caſe of *Butler* verſus *Duncomb*, 2 *Vern.* 760. was cited; and likewiſe Sir *Tho. Jones* 201. and a Caſe in Point *totidem verbis*, 1 *Salk.* 159.

King Chancellor: The Words, *After the Commencement of the Term*, govern the Truſt, in the Caſe of *Butler* and *Duncomb*; and here the Words, *from and after Default of Iſſue Male*, govern the Truſt; but as the Term does not veſt in the Truſtees till Failure of Iſſue Male, till then no Intereſt ought to be paid for the Portions, which is from the Year 1727. The Dame *Dorothy* died long before; and decreed the 500 Years Term expectant upon the Determination of the Life-Eſtate in Sir *George Rivers* to be ſold before a Maſter; and if there was any Surplus remaining after Payment of the 6000*l.* with Intereſt, then ſuch Surplus to be paid to Sir *George Rivers* who had the Inheritance.

Vide Brome verſus *Berkeley*; *Houſe of Lords Caſes*. 2 *Vern.* 761. *S. C.* 2 *P. Wms.* 484. *Gerrard* verſus *Gerrard*. 2 *Vern.* 460. *Staniforth* verſus *Staniforth*. *Ibid.*

Harvey

Harvey *versus* Woodhouse & *al'*, 4 Geo. II.

(4.)

THE Plaintiffs were the Appointees of the *Cestui que Trust* in a Defeasance of a Judgment acknowledged to *A.* by two Conuzees; one of the Conuzees died soon after the Judgment acknowledged; the Survivor died in the Life-time of the Conuzor, and made the Conuzor his Executor, by which the Judgment at Law was extinguished; whilst this Judgment was thus suspended, the Conuzor aliens part of the Land to *B.* for a valuable Consideration, and by a Conveyance after Marriage settles the other Part upon his Wife and Children. *Note*; There was a Recital of a Marriage-Article in the Settlement, but no Articles were proved.

Bill to have Satisfaction for a Judgment out of the personal Assets.

This Bill was now brought, the Conuzor being dead, against his Executors, against the Heir at Law, and against the Wife and Children, and against the Purchaser, to have a Satisfaction for this Judgment out of the personal Assets, and if they fall short, out of the Purchaser's and the settled Estate.

Dr. —— But it appearing the *Purchaser had no Notice of the Judgment*, the main Question was, Whether the whole Estate of the Volunteer shall be subject to this Judgment, or only a Moiety as would have been liable at Law, taking this Settlement to be voluntary. It was argued, that the Estate in the Hands of the Volunteer did not exceed a Moiety of the whole Estate which the Conuzor had at the Time of the Judgment, and before

before the Suſpenſion of it; ſo that as once that might have been taken by the Sheriff, it ought to be ſtill liable in Equity, and ſold for the Satisfaction of the Judgment.

It was afterwards moved in behalf of the Conuzor's Widow, that ſhe might be at Liberty to prove a Copy of her Marriage-Articles; it was ſaid that they were recited in the Settlement, and it would be hard, if this was a Proviſion before Marriage, that ſhe ſhould be deprived of it.

That this Court after a Cauſe is heard often directs a Will to be proved, and that is not merely an Exhibit; for there the Sanity of the Teſtator, or whether it was duly atteſted, was to be litigated.

On the other Side it was ſaid, that this Cauſe has been heard, and only ſtands for Judgment; and no Inſtance, where the Court will give Leave, after the Hearing, to prove that which, if made out, will not be Evidence; for a Copy of Articles is not Evidence without ſome other Account given of the Articles themſelves.

King Chancellor: I have conſidered of this Caſe, and determined with my ſelf what Decree to make. And I think the Lands muſt be extended in Equity *in æquali jure* as at Law, and all the Lands compriſed in this Settlement may be taken. If a Conuzee aliens Part of his Lands, and Part deſcends, the part that deſcends may be extended; and the Heir ſhall not have Contribution againſt the Alienee; and if the preſent Defendant, who claims under the Settlement, is only a Volunteer,

(5.) Volunteer, she ought to be considered as an Heir. But I am not satisfied that this is a voluntary Settlement; and therefore referred it to the Master, to see if any Marriage-Articles were executed, and when, and upon what Consideration.

Lady Abergavenny *versus* Lady Abergavenny, 4 Geo. II.

Motion a Bill might be taken pro Confesso, *for want of an Answer.*

PLaintiff filed a Bill against Defendant, to which Defendant put in an Answer; the Plaintiff's Bill was twice after amended, and Discovery of new Matter required; Defendant put in a Plea and Demurrer in Bar of such Discovery; which being over-ruled, the Defendant was in Contempt to a Sequestration for want of an Answer. The Plaintiff said the Sequestration had been executed a Year ago, and therefore moved, that the Bill might be taken *pro Confesso* for want of an Answer, alledging, that by the Practice of the Court, whenever a Defendant has appeared, and the Process of Contempt for want of an Answer is carried to the End of the Line, the Bill may be taken *pro Confesso*; or otherwise there would be a Failure of Justice, when a Matter is inquired of which lies only within the Knowledge of the Defendant, and of which the Plaintiff can have no other Discovery but by the Defendant's Oath. But it was objected, here was a sufficient Answer to the original Bill; and no Precedent could be produced, that

that where any Part of a Bill was answered, the Residue might be taken *pro Confesso.*

King Chancellor: If an Action at Law be brought to several Trespasses, and the Defendant's Plea goes only to Part, Plaintiff may sign Judgment as to all the Rest; and here *pro tanto* of the amended Bill that is not answered, it may be taken *pro Confesso. Sed Adjornatur.*

Note; When a Defendant is in Contempt for want of an Answer, and an insufficient Answer is put in, that is no Answer at all; and the Plaintiff is not to begin his Process *de novo*, but go on regularly from the last Process.

Bedford *versus* Backhouse, Nov. 26. 1730, 4 Geo. II.

(6.) *Lands mortgaged in Middlesex, and registred, whether the first Mortgagee, advancing a further Sum after a second Mortgagee, shall take place.*

THE Case was: A Man had made a Mortgage of Lands in *Middlesex*, and the same was duly registred; afterwards he made a Mortgage to another Person, which was also registred according to the Statute; and after the making that second Mortgage, the first Mortgagee advanced a further Sum of Money to the Mortgagor on the Premisses, without Notice of the second Mortgage; and the Question was, *Whether the Registry of the second Mortgage was constructive Notice, so as the Money lent subsequent to it should not be paid off till that was satisfied*; *and it was held by* King *Chancellor, that it was not*; for the Statute declares Deeds not registred void as against

against Purchasers, but gives no greater Efficacy to Deeds registred than they had before the making of the Statute; and it is a known Rule in the Court of Equity, that when a first Mortgagee advances a further Sum of Money (without Notice) after a second Mortgage made, that he shall be paid his whole Money in the first place.

Anonymus, Nov. 16. 1732. 4 Geo. II.

The Word disposed *related to the Estate of the Devisor.*

THE Words of a Will were, "I give and "bequeath my Lands, Tenements and "Hereditaments to my Wife, to be divided "and disposed of amongst my youngest Chil-"dren"; and it was held *per Jekyll* M.R. that the Word *disposed* related to the Estate of the *Devisor*; for that the Lands could not be disposed of, but the Estate, and consequently the Wife had a Fee.

Williams *versus* Sawyer & *al'*, Nov. 17. 1730. 4 Geo. II.

Voluntary Bond by the Husband to Trustees for Wife's Benefit, to be paid before Legacies.

IT was said *per Jekyll*, and so decreed, that where a voluntary Bond is given by the Husband to Trustees for his Wife's Benefit, that a Court of Equity will postpone such Bond even to Debts on Simple Contract, but will admit it to be paid before Legacies.

Anonymus,

Anonymus, Pasch. 4 Geo. II.

ON Motion to superfede a Commiffion or Bankruptcy, the petitioning Creditor was only Affignee of an Obligee. And *per King* Chancellor, He is not a Creditor that can take out a Commiffion; it muft be a Creditor in Point of Law, and not one who has only an equitable Right: The Obligee is Truftee for the Affignee, and at Law he muft fue in his Name. Declaratory Claufes in Temporal Laws may be perpetual, as that Graziers, Farmers, *&c.* cannot be Bankrupts, as mentioned in the Statute *Geo.* 1. tho' the Act be expired.

(7.) *Bankruptcy, the petitioning Creditor only Affignee of an Obligee, not a Creditor that can take out a Commiffion.*

Thoroton *verfus* Blackborne *& al'*, May 12. 1731. 4 Geo. II.

W*Illiam Hewett* Esq; being feifed and poffeffed of a large Real and Perfonal Eftate, on the 9th of *Sept.* 1715. made his Will, and after feveral Bequefts devifed all his Freehold, Manors, Lands and Hereditaments, and all his perfonal Eftate to Truftees, and their Heirs, *&c.* upon Truft they and the Survivor of them, and the Heirs of fuch Survivor, fhould with all convenient Speed convey the faid Freehold Premiffes to his Godfon *Hewer Edgeley* for Life *fans* Wafte; Remainder to Truftees, to preferve contingent Remainders; Remainder to the firft and every other Son of *Edgeley* in Tail Male; Remainder to the Daughters of *Hewer Edgeley*, and the Heirs

Devife of Freehold Manors, Lands, &c. upon Truft to convey, &c.

Heirs of their Bodies, as Tenants in Common; with a Power to *Hewer Edgeley* to make a Jointure upon any Wife, ſo that it exceed not a Moiety of the Eſtate: And directed, that his perſonal Eſtate ſo deviſed to Truſtees, and the Produce thereof, as ſoon as any conſiderable Part thereof could be got in, ſhould be diſpoſed of in the Purchaſe of Lands and Tenements of Inheritance, and be ſettled to the ſame Uſe with the Freehold Premiſſes; and in caſe *Hewer Edgeley* ſhould die without leaving Iſſue behind him, or if ſuch Iſſue ſhould happen to die without Iſſue, then his Will was, that his real Eſtate, and the Eſtate to be purchaſed with his perſonal Eſtate, ſhould be ſo ſettled, that in caſe his Kinſwoman *Anne Edgeley* ſhould be then living, that ſhe ſhould enjoy the Rents of his whole Eſtate for Life; and after her Deceaſe, one fourth Part thereof was to be enjoyed by *William Blackbourne*, his Heirs and Aſſigns; one other fourth Part by *Abraham Blackbourne*, his Heirs and Aſſigns; one other fourth by *Anne Jackſon*, her Heirs and Aſſigns, and the remaining fourth Part by *Suſanna Edgely*, her Heirs and Aſſigns; and directed, that in caſe any of them the said *William Blackbourne*, *Abraham Blackbourne*, *Anne Jackſon*, and *Suſanna Edgeley*, ſhould happen to be dead at the Time when by Virtue of the ſaid Settlement the whole Eſtate ſhould devolve upon
(8.) them, that then the fourth Part to which the Perſon ſo dead would have been intitled to, if living, ſhould be conveyed to the reſpective Heirs of the Perſon ſo dead.

The

The Teſtator died ſoon after making his ſaid Will, and ſhortly after *Hewer Edgeley* married, and made a Jointure according to the Power given by the Teſtator's Will. *Abraham Blackbourne* made his Will 16 *March* 1709. and made his Wife *Mary* Reſiduary Legatee and ſole Executrix; and on the 16 *Feb.* 1720. duly made a Codicil to his Will, and after, reciting the Deviſe to him by *William Hewer* of the fourth Part of his Eſtate, under the Contingencies of his Will, the ſaid *Abraham Blackbourne* deviſed, that whenever the fourth Part ſhould come to his Son and Heir *Levett Blackbourne*, or to ſuch other Perſon as ſhould be his Heir, the ſame ſhould be charged with the Payment of 12000*l.* to his Wife *Mary Blackbourne*, and 3000*l.* a-piece to his three younger Children, and died ſoon after making ſuch Codicil. And *Mary* his Widow ſoon after married with the Complainant *Thoroton*. On the 17 *Feb.* 1729. *Anne Edgeley* died, and on 6 *Nov.* 1728. *Hewer Edgely* died without Iſſue; and in *Hillary* Term 1729. the Complainant *Thoroton* and *Mary* his Wife, and her three younger Children by their next Friend, brought their Bill againſt *Lewett Blackbourne*, the Heir at Law of *Abraham*, *& al*, to have the 12000*l.* and 9000*l.* raiſed out of *Abraham*'s fourth Part of the Eſtate of *W. Hewett*. And it was objected by Defendant's Counſel, that the Charge made thereon by *Abraham* was void; for the fourth Part veſted in the Heir of *Abraham* as a Purchaſer, *Abraham* being dead before the Settlement made, and before the

the Estate devolved upon him; and his Will created two distinct Contingencies, *viz.* to *Abraham*, if he should be alive at that Time, if not, to his Heir. This therefore not being a Remainder vested in *Abraham*, is not subject to the Charges made upon it by his Will. *King* Chancellor said, that the first Part of the Will gave a Fee to *Abraham Blackbourne* of a fourth Part, upon the Contingencies there mentioned, and therefore it became a vested Remainder; and the latter Clause or Proviso did not restrain the Devise, but was directory only to the Trustees how to convey, in case the Parties who were to take the Benefit died before the Settlement made. Another Question arose, whether a Day should be given to *Levett Blackbourne* (he being an Infant) to shew Cause against the Decree; and it was held, that were the legal Estate in Trustees, and not in the Infant, and an Execution of the Trust is to be directed, that there is no Occasion that a Day should be given; and the Money was therefore decreed to be raised, and no Day given to the
(9.) Infant to shew Cause against the Decree. *Vide* 2 *Vern.* 429. *Cooke* versus *Parsons*.

Vernon *ver*. Vernon, Pasch. 4 Geo. II. 1731.

HENRY *Vernon* being at *Aleppo* in *Turkey*, and possessed of a large personal Estate, in the Year 1694. made his Will, and thereby devised

devised some particular Legacies, and gave the Residue of all his moveable Goods, *&c.* to his Brother *Thomas Vernon*; but if he died without Heirs Male of his Body, then he devised the Legacy given to *Thomas* to be divided equally between his other Brothers *George* and *Charles Vernon*, and made his Brother *Thomas Vernon* his Executor; but in case *Thomas* should die first, he appointed his Father Sir *Thomas Vernon* his Executor; and desired, that each of them (in the Name of God) would see his Will performed. The Testator died soon after, and *Thomas* his Brother proved his Will in 1695. and possessed his personal Estate and Effects; and afterwards, being in Treaty for a Marriage, in Consideration thereof and of the Marriage-Portion, and that certain Lands of the intended Wife were agreed to be settled, he enters into Articles under his Hand and Seal, and thereby covenants with Trustees to purchase Lands of the yearly Value of 350*l.* within fifty Miles of *London*, or in the County of *Chester*, out of an Estate formerly belonging to the *Vernons*; and which when purchased were to be settled to the Use of himself for Life; and after his Decease, Part thereof to the yearly value of 150*l.* was to be settled to the Wife for Life, in Bar of her Dower, and the Residue to Trustees for ninety-nine Years, determinable upon the Death of the Wife; and from and after her Decease, to the Use of the first and other Sons of the Marriage in Tail Male; Remainder to the Heirs Male of the Body of *Thomas*, with Remainder to *George Vernon* for Life

Life; Remainder to his first and other Sons in Tail Male, with Remainder to *Charles Vernon* for Life; Remainder to his first and other Sons in Tail Male, with Remainder to the right Heirs of *Thomas*.

Note; Sir *Thomas Vernon* the Father was a Party to and executed the Articles, but did not grant any Estate thereby, or covenant to make any Provision for his Son, nor did it appear that he parted with any Thing to his Son on Account of the Marriage. The Marriage took Effect soon after the Date of the Articles, and *Thomas* had Issue by his Wife three Daughters, and no Son, and *Thomas* did not purchase any real Estate in Pursuance of the Articles; but in the Year 1726. made his Will in Writing, and gave each of his Daughters 5000*l.* a-piece, and made his Wife *Jane* Executrix and Devisee of his real and personal Estate, subject to his Debts and Legacies, and soon after died.

(10.)

George and *Charles Vernon* sent to the Widow to make a Purchase and settle it according to the Articles; who (before she had advised) returned Answer, she would do it in convenient Time, and that her Husband had directed her so to do; but she afterwards refused; and thereupon *George* and *Charles Vernon* brought a Bill against her for a specifick Performance of the Articles.

Bill for a specifick Performance of Articles.

Counsel *pro Quer'* insisted, that it did not weaken the Plaintiffs Title, that they were not Parties to the Articles; for if a Remainder is limited by Deed to any Person not a Party, it is not to be questioned but such a Remainder

mainder is good; that the Covenant entred into by the Articles, for the Benefit of *George* and *Charles Vernon*, was made upon a good Consideration, and it was intended thereby to keep up the Name and Family; the Father was a Party thereto, and would not have otherwise consented to the Marriage; and *Thomas*, who entred into the Covenant, had an Eye and Regard to his Brother *Henry*'s Will; and altho' the Devise over to *George* and *Charles* was void, yet it was sufficient to bind the Conscience of *Thomas*. And Courts of Law and Equity will allow such Things to be a good Consideration, tho' the parties are not compellable otherwise to do the Act. As if there are Creditors upon whose Deaths the Statute of Limitations has run, and afterwards an Executor or Administrator promises to pay them; such a Promise shall bind, and shall not be accounted a *Nudum pactum*. And they quoted the Case of *Osgood* versus *Stroud*, which had been heard by Lord *Macclesfield*, and afterwards reheard by his present Lordship.

Vide Cases in Law & Eq. (10 *Mod.*) 533, 534.

Mr. Solicitor General *Talbot & al' contra*. That the Covenant whereof the Plaintiffs prayed a specifick Performance was voluntary; and that this Court had in no Instance decreed a specifick Performance of a voluntary Covenant; that it did in no wise alter the Case; that Sir *Thomas* the Father was a Party to the Articles, he was made so out of Respect and Reverence to him, but no Consideration could arise from thence; for that he granted nothing, nor did he covenant to do any Thing for his Son; which was otherwise in the Case of

Osgood versus *Stroud*; that there was no Occasion in the present Case, nor could it stand in Reason to seek out and cast about for what Consideration the Articles were made, the Considerations are expressed therein, *& expressio unius est exclusio alterius*; nor can it be said with Reason, that *Thomas* had Respect to his Brother *Henry*'s Will at the Time of making the Articles; for the Limitations in the Articles do not pursue the Limitations in *Henry*'s Will, but are evidently different; and if the now Plaintiffs had brought a Bill against *Thomas* for the Performance of the Articles, the Court would not have decreed it; for it would have been in *Thomas*'s Power to undo it the next Day; and cited the Case of *Bellingham* versus *Lowther*, 1 *Chan. Ca.* 243. and the Case of *Thompson* and *Lord Eversham*, *Trin.* 1715. Lord *Eversham* covenanted with *Thompson* to present his Son to a certain Benefice when it became void, and he had the Estate; the Event happened, and Lord *Eversham* refused to present *Thompson's* Son; and he brought a Bill to compel the Performance; but the Bill was dismiss'd with Costs, it being a voluntary Covenant.

(11.)

King Chancellor: He did not apprehend that all voluntary Covenants were not to be compelled to a Performance; but he doubted whether this was a voluntary Conveyance; *Thomas* must be supposed to have Regard to his Brother's Will at the Time of making the Articles; and accordingly decreed a specifick Performance. *Quære* as to this Decree.

Man

Man *versus* Man, May 11. 1731.
4 Geo. II.

Coram Jekyll *Master of the Rolls.*

S*ampson Man*, being possessed of a personal Estate, on the 18th of *December* 1718. made his Will, and thereby gave all the Interest, Use, Profit and Benefit of his personal Estate to his Wife *Agatha* for her Life, during her Widowhood, and after her Death directed that his personal Estate should be divided equally between his Brother *Benjamin* and his Sisters *Lydia*, *Mary* and *Elizabeth*, and made his Wife sole Executrix. *Mary* and *Elizabeth* died before the Testator, and he dying in 1727. his Widow proved his Will and possessed his Effects. *Benjamin* and *Lydia*, the surviving Residuary Legatees, brought their Bill against the Widow and Executrix for an Account of the Testator's personal Estate, and that the whole might be secured for the Purposes in the Will.

Interest, Use, Profits, &c., to a Wife for Life.

Bill against the Widow, that the personal Estate might be secured for the Purposes in the Will.

It was agreed in arguing this Case, that the surviving Legatees were intitled only to two fourth Parts of the Testator's Estate upon the Contingency in the Will; and the sole Question was, whether the Executrix should take the two remaining fourth Parts to her own Use, or whether they should be distributed according to the Statute.

(12.)

Talbot Solicitor General argued, that the Testator did not mean that the Executrix should have more than the Use and Profit of

his Estate during her Widowhood, for that he had disposed of the whole by his Will, and therefore that the Shares of the Legatees who died before the Testator were distributive according to the Statute.

*Mead pro Def*t argued, that where the Intent does not plainly appear, that the Executrix should not take any Benefit by the Will, but what is therein expressed, the Law ought to take place; and by Law the Executrix is intitled to what is not partly disposed of; that it did not follow, because the Testator had given the Use of his whole Estate to his Wife for Life, that she should stand as a Trustee for the next of Kin, in case any of the Legatees died before the Testator.

Jekyll M. R. said, This Court had considered the Executrix as a Trustee for the next of Kin, chiefly in Cases where the Testator had not disposed of his whole Estate at the Time of his Will, but had left Part undisposed of.

That the Testator in this Case had disposed of the whole; and it was natural for him to suppose, that making his Wife Executrix intitled her to the Shares of the Legatees dying before him; for otherwise he might have prevented it by a Codicil, had he thought fit. And decreed, that the Defendant the Widow was intitled to a Moiety in her own Right; and directed, that the other Moiety of the Estate should be brought into it, and secured for the purposes in the Will.

Note; This Decree was afterwards affirmed in the House of Lords 1731.

Willing

Willing *versus* Baine, June 21, 1731. 5 Geo. II.

D*Orothy Baine* by Will 1723. gave a Legacy of 200*l.* to *Mary Billing*, 300*l.* to another Legatee, 100*l.* to a third Legatee, (all Infants) payable at twenty-one, and if either of them died before twenty-one, then his or her Legacy to go to the Survivor or Survivors; and one of the Legatees died in the Life-time of the Testator; and the Question was, whether this was a lapsed Legacy, or should go over to the other Legatees.

Legacy, whether lapsed.

King Chancellor: A Legacy is lapsed where there is no Person to take according to the Will; but if it can take Effect according to the Will, the Legacy cannot be lapsed; here it may take Effect; as if Lands are devised to *A.* for Life, and after to *B.* though *A.* dies in the Life-time of the Testator, *B.* shall take; and so decreed, that the Legacy should go to the other Legatees. *Vide* 2 *Vern.* 207. a Case in Point. 2 *Vern.* 467. 611. The Legacy also shall carry Interest from the Time of the Death of the Testator. (13.)

Attorney General *versus* Hall, July 5. 1731. 5 Geo. II.

T*HOMAS Hall* by his Will bearing Date 16th of *Feb.* 1717. devised (*inter alia*) as follows, "I give and bequeath unto my "Son *Francis Hall*, and the Heirs of his "Body

" Body lawfully begotten, all my real and per-
" sonal Estate to his and their own Use within
" three Years after my Decease; but in case
" my Son *Francis Hall* shall depart this Life,
" leaving no Heirs of his Body lawfully be-
" gotten living, then I give all and so much of
" my Estate as he shall be actually possessed
" of at the Time of his Death to the Corpo-
" ration and Company of Goldsmiths in *Lon-*
" *don*, upon Trust, *&c.*" *F. Hall* died without any Children, and this Information was brought by the Goldsmith's Company to have the Estate of *Thomas Hall*, both Real and Personal Estate, appropriated to the Charity as directed by *Thomas Hall*'s Will. As to the real Estate, the Defendant, who was the Executrix of *Francis Hall*'s Will, pleaded a Common Recovery which her Husband had suffered, whereby he declared the Use thereof to himself in Fee, and devised the same afterwards to her. And upon arguing this Plea, the Court allowed the same, being of Opinion, that *Francis Hall* was Tenant in Tail of the real Estate under the Will of *Thomas Hall*, and that the same was consequently barred by the Common Recovery; so that the only Question now before the Court was, whether this Limitation over to the Goldsmith's Company was a good Limitation over of the personal Estate.

Information to have both real and personal Estate appropriated to the Charity.

Counsel *pro Quer'*: The only Question is, whether the Devise over to the Goldsmith's Company was a good Limitation or not? I beg Leave to consider it in two Lights. 1*st*, Instead of the Words (*Heirs of his Body*) the Word

Word (*Sons*) had been mentioned; and *2dly*, As it now stands with these Words (*of the Heirs of his Body*); and *1st*, If the Word *Sons* had only been mentioned, then the Devise over to the Goldsmith's Company would have been good. (14.)

These executory Devises were formerly not known in the Law; and such Limitations over were allowed at first in Cases only of Chattels Real, as appears in *M. Manning*'s Case, 8 *Rep.* 94. which was the first Case; afterwards *Lampet*'s Case in 10 *Rep.* 46. was determined, where these Limitations were carried somewhat further; and since those Cases were personal, meer personal Chattels have been allowed to have been limited over. In the present Case, the Contingency, upon which the Charity is given, is to arise within the Time limited by Law, *viz.* upon *Francis Hall*'s dying without Issue living at the Time of his Death, and not after a general dying without Issue, which would be void; the Words of the Will are, *If he shall depart this Life leaving no Heirs of his Body lawfully begotten living, then I give*, &c. *Heirs of the Body* must be *Heirs of his Body at the Time he shall depart this Life*; and the Words *leaving* and *living* are very significant and express, and refer to the Point of Time before, which is the Time of *Francis Hall*'s Death; the Word *then* may likewise refer to the Time of *Francis Hall*'s Death, and denote when the Contingency shall happen; but tho' it may be in different Cases applied to either, yet in the present Case it refers to the Time, and not to the

the Contingency in Question. 1 *Vern.* 234, 250, 298. 2 *Vern.* 38, 59, 766. These Cases shew how it would have been, if instead of the Words *Heirs of the Body* there had been the Word *Sons*; and if there are other Words in the Will which shew what the Testator meant by the Words *Heirs of his Body*, and that he only intended *Heirs of the Body at the Time of* Francis Hall's *Death*, it will come to the same Thing; and the latter Words of the Will, *viz.* "But in case my Son *Francis* shall "depart this Life, *&c.*" are restrictive of the Generality of the former Words, (*Heirs of his Body*). As where a Devise is to *A.* and his Heirs, so long as *B.* shall have Heirs of his Body, there, tho' *A.* by the first Words takes an absolute Fee, yet they are restrained by the subsequent Words; but the Words (*Heirs of the Body*) in this Case are only applicable to the Testator's Real Estate, which may be intailed; and not to his personal Estate, which cannot be intailed and made capable of being taken and received by Discent; but as to his Personalty, they were to vest a Property only; and then the Question will be, whether this Limitation over will be good. 2 *Vern.* 86, 195. Tho' there is a Real Estate devised by his Will as well as a Personal Estate, and the same Words pass both Estates, yet such a Contingency may afterwards be inserted (as in the present Case) to determine the Property as to the Personal Estate.

(15.) Counsel on the same Side: This Limitation to the Goldsmith's Company is good as an executory Devise. Executory Devises are not within

within the Rules prescribed by the antient Common Law, but are Evasions out of it, which the Courts of Law have allowed and come into, to answer and comply with the Intent of the Testator; and if the present Words will bring this Case within the known Rules concerning executory Devises, this Court will countenance this Limitation; and this Court has often allowed such Limitations over, to comply with the Intent of the Testator, tho' they have not been so strictly conformable to the Rules, as in the present Case. It is said there are two Contingencies in this Case, *viz. Francis Hall* dying without Issue at his Death, and also his being actually possessed, *&c.* for only such of the Personal Estate, as he should be possessed of at his Death, is limited over; and therefore the Limitation over is void; but I apprehend that such a Limitation may depend on a double Contingency; and so several of the Cases cited in *Vernon* prove.

Talbot Solicitor General *cont'*. The Limitation to the Goldsmith's Company is void, and the Information must be dismissed. By Will the Residue both of the Real and Personal Estate is devised to *Francis Hall* and the Heirs of his Body, to his and their Use. As to the Real Estate, it is an Intail executed; and as to the Personalty, which cannot be intailed, it gives an absolute Property; and the Will limits nothing over to the Goldsmith's Company, but what *Francis Hall* should be actually possessed of at the Time of his Death; so that there is Power left in him to alien and dispose of all or any Part of it; besides, there are

are other Words in the Will which shew that *Francis Hall* had the sole Property of the Personalty vested in him; for the Words are, "But my Will is, that the Company of Gold-"smiths shall not give my Son any Trouble "on any Account whatsoever concerning my "Estate." So that taking it for granted, that *Francis Hall* had an Interest vested in the whole Personal Estate, (and which, if he had pleased, he might have spent every Farthing,) the single Question will be, whether this Limitation or executory Devise to the Goldsmith's Company will be good or not; and I think it is void. 2 *Vern.* 245. *Clarges* versus *Dutchess of Albermarle*. There the Difference is taken between Chattels Personal that are vested, and where the Use only is devised. 2 *Vern.* 600. *Higgens* versus *Dowler*; 1 *Salk.* S.C. 156. And the Case of *Richards* versus *Lady Abergavenny* is in Point; where a House together with the Furniture thereof was limited to a Wife and such Heirs of her Body as should be living at her Death, and in
(16.) Default of such, Remainder over. The Wife has an Estate-tail in the House, and an absolute Property in the Furniture. 1 *Vern.* 326, 347. *Whitmore* versus *Weld*; 2 *Vern.* 367. is a strong Case; where such a Limitation of a Personalty over was held ill, because it was an Interest vested. 1 *Vern.* 478. *Deering* versus *Hanbury*; 2 *Vern.* 110. *Webb* versus *Webb*; *Cro. Jac.* 590. *Pells* and *Brown*'s Case is the Intail of an Inheritance. The Counsel for the Plaintiff does not know what Decree to pray, whether only such specifick

Part

Part of the Perſonal Eſtate which *Francis Hall* was actually poſſeſſed of at the Time of his Death, or whether there ſhould not be a Decree that his Repreſentatives ſhould account for ſo much as he ſpent; to inſiſt upon the laſt is repugnant to the Will, becauſe *Francis Hall* by the Will had Power to diſpoſe of the whole as he thought proper; and as to the other, that makes the Deviſe over dependant on two Contingencies, and therefore void; ſo that if there be a Limitation over in the preſent Caſe, (which there cannot, becauſe an Intereſt and Property is actually veſted;) yet as the preſent Caſe ſtands, it would be a void executory Deviſe, becauſe it is not confined to dying without Iſſue at the Time of *Francis Hall*'s Death. The two Words inſiſted upon in the Will to confine the Dying without Iſſue to the Time of the Death of *Francis Hall* are (*living* and *leaving*); but if a Man dies without Heirs of his Body, he dies without Heirs of his Body living, and if he leaves no Iſſue, he dies without leaving Iſſue; but for the Reaſons aforeſaid this is not material to be determined.

King Chancellor, *Jeykll* Maſter of the Rolls, and *Reynolds* Lord Chief Baron: In regard the Ownerſhip and Property of the Perſonal Eſtate was veſted in *Francis Hall*, and not the Uſe only; this was held to be a void Limitation to the Goldſmith's Company. It is giving a Man a Sum of Money to ſpend, and limiting over to another what does not happen to be ſpent; and therefore the Information was diſmiſſed.

And

And so *Note* a Difference between a Devise of Chattels Real and Personal.

Selby *versus* Selby, 5 Geo. II.

SErjeant *Selby* made his Will, and appointed his Wife sole Executrix and sole Guardian of his Son, and then devised further, "That if my dear Wife shall marry again "before my Son shall attain his Age of twenty-"one Years, that then and from thenceforth "I appoint my Brother Executor and sole "Guardian of my Son." The Mother died, the Son being about thirteen Years of Age; and the Question was, whether the Uncle, (who would have been Guardian in case the Wife had married again,) should now be Guardian, or the next of Kin, who could not inherit.

(17.)

Whether Uncle or next of Kin should be Guardian.

King Chancellor: Here is no Limitation of the Guardianship to the Wife for Life. It seems to me that the Uncle must have been Executor and Guardian at the same Time; he should not have much doubted but that the Uncle would not have been, was it not for the Case cited in *Raym. T.* 427. and 3 *Lev.* 125. and a Case was made of it for the Opinion of the Judges of *B. R.*

Anonymus, 5 Geo. II.

COUNSEL moved to extend an Injunction to stay Proceedings against the Bail. The Plaintiff before he filed his Bill had

had been arrested, and Bail was given to the Sheriff. Plaintiff afterwards had obtained an Injunction upon a *Dedimus*, notwithstanding which the Defendant had taken an Assignment of the Bail-Bond, and was proceeding at Law against the Bail.

Injunction to stay Proceeding against Bail.

Lutwyche cont': A common Injunction extends only to delay Execution, it stays nothing else, and the Plaintiff at Law may proceed to Judgment; and whenever it is extended to stay Proceedings against the Bail, it is always particularly mentioned.

King Chancellor: If a Declaration is delivered, the Party may proceed to Judgment notwithstanding an Injunction, and Execution is only stayed; and if no Declaration has been delivered, all Proceedings at Law are stayed; that is the Practice and Construction that has been constantly put upon the Words in the latter End of the Writ it self. Motion was granted.

Vizod *versus* Londen, 5 Geo. II.

A Bond was entered into before Marriage by the Defendant's Husband for the Sum of 500*l.* and the Condition recited the intended Marriage, and that the Obligor was to receive a competent Fortune, and thereupon the Obligor was to settle Lands of the yearly value of 14*l.* as Counsel should advise, to the Use of the Defendant for Life, for her Livelihood and Maintenance, if the Marriage should take Effect and she should survive her Husband; otherwise the Bond to stand in full Force

Bond before Marriage, if a Bar of Dower.

Force. The Question was, if this should be a Bar of Dower. The Master of the Rolls was of Opinion it was not; but *King* Chancellor, being of a different Opinion, reversed his Decree.

(18.)

King Chancellor: Several Estates that are not specified in the Statute 27 *H.* 8. *c.* 10. 1 *b.* are yet within the Equity of the Statute, and the present is not a Case within the Letter of it; but whenever an Estate is settled so as to fall and take Effect immediately upon the Death of the Husband, with a Covenant or other Instrument, declaring it to be as a Jointure or in Bar of Dower, and is tantamount to its being an actual Settlement within the Letter of the Statute. What is necessary to be done by the Words of the Statute? The Words are expresly (*for the Jointure of the Wife*,) but the Statute does not say that the Jointure must be, to be expressed in Bar of Dower. The Bar of Dower is only a Consequence of its being a Jointure; and a Jointure, according to my Lord *Coke*, is a Provision and Maintenance for the Wife; and sure this is expressed to be so, and therefore within the Description of it. Before the Statute 29 *Car.* 2. of Frauds, a parol Averment of any such Provision being made as a Jointure was sufficient. Decree reversed; *vide* 4 *Rep.* 1 *Vernon*'s Case. 2 *Vern.* 505.

Evelyn *versus* Evelyn, 5 Geo. II.

THIS Cause came on to be heard before *King* Chancellor, assisted by *Raymond* C. J. and *Jekyll* Master of the Rolls, on the 26th

26th of *Oct.* 1730. The Case was this: *George Evelyn* the Grandfather being seised of several Estates, *viz.* of an Estate for Life, with Remainder to his son *John* in Tail, and likewise of other Lands in Fee, (all which Estates lay in the County of *Surry*, and were of the Value of 900*l.* *per Annum*, or thereabouts,) settled the same by two several Deeds, the one dated 20th of *October* 1698. relating to the intailed Lands, and the other dated 21st of *Nov.* 1698. relating to the Fee-simple Lands, to the Use of *George* the Grandfather for his Life, with a Power to charge the same with 6000*l.* and after his Decease to the Use of *John* for Life, Remainder to his first and other Sons in Tail Male, with like Remainders to the second, third, and fourth Sons, *&c.* of *George* the Grandfather, with Remainder to himself in Fee; and in both these Deeds there was this Clause, *viz.* "That it should be lawful for *George* the "Grandfather, together with such Son as "should be next in Remainder, and after the "Death of *George* the Grandfather, then and "for every the Son and Sons as should be in "Possession of the Premisses, to make any (19.)
"Lease or Leases *sans* Waste (so it be with-"out Prejudice to any Jointure,) for raising "Portions for a Daughter or Daughters of "such Son or Sons, and so as such Portions "do not exceed the Fortune of the Wife, and "so as such Lease be not to take till Failure "of Issue Male". But there was some Difference in the Wording of the Clauses of the two Deeds; for in the Deed, by which the Fee-simple

Fee-simple Lands were settled, it was expressed in this Manner, *viz.* "To make a "Mortgage, or to make any Lease or Leases, "so as the same be determinable upon raising "such Portions, and the Costs and Charges "attending the same."

George the Grandfather had Issue five Sons, *John*, *George*, *Edward* and two others; *George* the Grandfather died in 1699. *John* his eldest Son died without Issue in 1703. *George* the second Son entered, and a Marriage being afterwards agreed to be had between him and Mrs. *Garth*, in Consideration thereof, and of his intended Wife's Portion, (which amounted to 8000*l.*) the said *George* covenanted by Deed 22d of *August* 1720. to appoint certain Lands contained in the former Settlement for his Wife's Jointure of the yearly Value of 790*l.* or thereabouts, and also devised the said Jointure Lands, and other Lands contained in the said two Deeds of Settlement, to Trustees for 500 Years, to take Effect on Failure of Issue Male by him, and subject to the Jointure; upon Trust, that if there should be Failure of Issue Male of the Body of the said *George*, begotten on his said intended Wife, and the said *George* should have one or more Daughters so begotten, that then the said Trustees and the Survivor of them, and the Executors and Administrators of such Survivor, should out of the Rents, Issues and Profits, or by Sale, Mortgage or Lease, as to them in their Discretion should seem meet, as soon as conveniently might be after the Decease of the said *George*, or in his Life, if he should

ſhould think fitting, to have the ſaid Portion or Portions ſooner raiſed, and ſhould ſo direct, to levy and raiſe the Sum of 8000*l.* to be paid to ſuch Daughters, Share and Share alike, (provided the Term ſhall not prejudice the Jointure). The Marriage took Effect, and *George* left Iſſue three Daughters, (the eldeſt about five Years old,) and died in the Year 1726. The Infant Daughters now brought the Bill by their Mother as *Prochein Amy*, to have their Portions raiſed.

Infant Daughters brought the Bill by their Mother as Prochein Amy *to have their Portions raised.*

It happened that *George* the Grandfather had charged the Premiſſes by Way of Mortgage for 1500*l.* according to his Power in the Settlement (whereby he had Power to charge the ſame with 6000*l.*) ſo that the Eſtate came to *George* his Son, ſubject to that Incumbrance; and the Mortgagee calling in his Money, the ſaid Mortgage was aſſigned over to a third Perſon; in which Aſſignment *George* then covenanted to pay the Mortgage-Money. *Edward Evelyn* the third Son, and next in Remainder, brought his Bill againſt the Aſſignee of the Mortgagee, and the Adminiſtratrix of *George* the Son, to have the Real Eſtate discharged, and that the Mortgage might be ſatisfied out of the Perſonal Eſtate of *George* his Brother; but as to this Matter his Bill was diſmiſſed.

(20.)

Mr. *Lutwyche* and two others, Counſel with the Plaintiffs in the original Cauſe, argued, that altho' it would very much hurt *Edward* the next in Remainder, that the Portions ſhould be raiſed immediately, yet the Court muſt regard only the Conſtruction of

the Settlement under which all Parties claim; and if it was the Meaning of *George* the Grandfather to preserve the Estate in the Issue Male of the Family, yet it was subject to the Charges in the Settlement; and for this Reason, because without Marriage there must be Failure of Issue Male; and the present Inconveniency arises only from too large a Portion, which the Jointress brought into the Family; the Power in the Settlement made in 1680. was to make Lease or Leases at a Pepper-Corn Rent, to raise Portions for Daughters upon Failure of Issue Male, and so as not to prejudice the Jointure; and since the Person who had such Power had executed it, for that Purpose it was vested *instanter*, and became immediately due; for when it is said such Power to make Leases shall not be but upon Failure of Issue Male, the Party may do it, and that the Interest shall be then vested; and so if a Portion be appointed to be paid out of Lands at twenty-one, it implies it shall not be paid before that Time; but when there is no Time of Payment limited, it is left to the Discretion of the Party to whom the Power is given to appoint the Time of Payment as he pleases; if the Portions are not to be raised now, at what Time shall they be raised? or is Part of the Portions to be raised now upon the Lands in Possession, and Part to wait the Death of the Jointress? This would be to construe the Words of the Settlement contrary to the natural Import and Construction of them. For the Clause which gives a Power to raise Portions is single and intire; the

Daughters

Daughters have now a present Occasion for their Portions, for there is no further Provision made for their Maintenance in the *Interim*; and if the Portions are not now to be raised, it may become a Question if they shall not sink in the Lands, should the Infants die before they are raised; and so the Portions may be intirely lost; and from the Nature of Portions, which are considered as Sums in Gross, it appears they ought to be paid in intire Sums, and not by Parcels out of the Rents and Profits; for the raising Portions in such a Manner would be like paying an uncertain Annuity, which would be more in one Year than another, or Part or the Whole (21.) thereof must be spent in Maintenance; whereas Portions are intended for the Advancement, and to be a lasting Provision for them, and to furnish a Maintenance from the Interest thereof. Neither is it an Objection to say, that the Portions in the present Case are restrained to be raised by way of Sale, and directed only to be raised by Lease and Leases: for a Man, that has a Power to make a Lease, may make a Lease absolute or conditional; also he may take a Fine upon such a Lease, and is in the Nature of a Sale; neither can it be objected that the Portions are not to be raised by a Sale; because by the Words of the Settlement it is said, "So as such Lease or "Leases be determinable upon raising such "Portions and the Costs attending thereon"; for a Proviso or a Restraint repugnant to the Thing granted is null and void; it must be intended to be meant, that the Lands com-

prised in the Settlement, and not leased, shall be wholly discharged. Besides, if a Man lends 8000*l.* upon such a Security, it cannot be said that the Lands have raised, or that it has been paid out of them, until the Principal, Interest and Costs are paid. The Person indeed has lent his Money, but not without Regard to Interest, and until the End and Purpose of the Security is served, surely it shall not be construed to be discharged. *Kilmurrey* versus *Green in Canc'*, 1713. Neither is it strange reversionary Terms should be sold to raise the Daughters Portions; it has been frequently done. (*Greaves* v. *Mattison*) *T. Jones* 201. 2 *Vern.* 458. *Gerrard* versus *Gerrard.* 2 *Vern.* 460. *Staniforth* versus *Staniforth*, which is a Case almost in Point; and 2 *Vern.* 72. *Earl of Rivers* versus *Earl of Derby*. That it was not to be disputed, but that *George* the Son had well executed the Power by the Deed of *August* 1720. and thereby directed, "That upon Failure of "Issue Male, the Portions should be raised as "soon as conveniently they might be;" which imports they should be raised as soon after his Death as possibly might; the Father certainly intended the Benefit of his Daughters; and whose Conveniency could he be supposed to regard, that of his own Children, or the Persons in Remainder, to whom it might never be convenient to pay their Portions? besides, the Father has provided no other Support or Maintenance for his Daughters.

As to the Demand of 1500*l.* by the Defendant's Cross-Bill, it was said to be a meer Fancy; that altho' *George* the Son had covenanted

nanted with the Assignee of the Mortgagee to pay the Money, such Assignee could only have the Benefit of the Covenant; for that the Land in this Case was the principal Debtor; and *George* the Son gave his Covenant only by way of collateral Security. And the Counsel compared it to the Case of a principal Debtor; and surely altho' both are liable at Law, yet a Court of Equity will lay the Burden where it ought to be born; and if the Surety is compelled at Law to pay the Debt, this Court will order the Repayment from the Principal. 1 *Lev. Jenkins* versus *Keymis*, 150. (22.)

Counsel argued *pro Def'*, That to raise the Portions by Sale of Part of the Estate during the Life of the Jointress, would be spoiling the whole Estate and rendring it of little Value; and that it never could be the Meaning of *George* the Grandfather, who made the Settlement 1680. in View and Favour of the Heirs Male of the Family, to design the Portions for Daughters should be raised by Sale of a reversionary Term, and thereby defeat his principal Intent to preserve his Estate in his Heirs Male; and the Intent of the first Grantor ought to be considered in the Construction of his Deed, and which was made of no other Consideration but to preserve his Estate and Family. That his Intent appears plainly from the Restraints laid upon the Power, that the Portions must be raised out of the Rents and Profits only; for it is directed to be done by Lease only, and that to be determined upon raising such Portions. If it was to be raised by a Sum in gross, the Security is declared to be

be determined as soon as such Portion is raised; and that it is one Thing to lease, and another to mortgage and sell; which is not provided by the Settlement. If Lands are extended upon a Judgment by *Elegit*, the Party shall hold them only till the Debt is satisfied out of the Rents and Profits, and shall not hold them afterwards in respect of any Interest to rise by that Judgment. The Plaintiffs are of tender Years, and have no Occasion for their Portions which are given for Advancement; and the Court will after determine what is a convenient Time for the doing of a Thing where no Time is appointed by the Parties. 2 *Vern.* 439. *Bruen* versus *Bruen*. 2 *Vern.* 208. *Norfolk* versus *Gifford*.

As to the Demand of 1500*l.* it was said, that this Court would always direct the Personal Estate to come in Aid of the Real Estate, either in Respect of an *Hæres natus* or an *Hæres factus*; that there was nothing to distinguish the present Case from the Case of Sir *John Nappier* and *Lady Effingham*; vide *House of Lords Cases*. (4 *Brown's P. C.* 340.)

But it was answered, that the Case of Sir *John Nappier* was nothing to the Purpose; for that *Edward*, who has brought the Cross-Bill, is neither an *Hæres natus* or *factus*, for that he claimed nothing under *George* the Son, but under the Settlement which was made in 1680. The Court took Time to advise, and directed the several Precedents to be laid before them.

Sheriff

Sheriff *versus* Morlock, Dec. 2. 1731. (23.)
5 Geo. II.

At the Rolls.

Legacy with Proviso not to marry.

THE Testator by his Will devised a Legacy of 500*l.* to his Niece out of certain Lands, Proviso if she should not marry in the Life-time of his Wife, or if she should marry in the Life of his Wife without her Consent, then the Legacy of 500*l.* was to sink into the Estate of the Devisee. The Niece married in the Life-time of the Wife, not only without her Consent but directly contrary to it; and the Question was, whether this 500*l.* was forfeited.

Counsel *pro Quer'*: Conditions of this Kind are void by the Civil Law, because they are in Restriction of Marriage, which is for Publick Good; and there are many Cases in *Swinbourne* to that Purpose; but by this Court they are not totally void; for where there is no Limitation over, such Condition is only *in terrorem*, and the Legacy is not forfeited. But where there is a Limitation over, it is otherwise, and a Forfeiture. But he said, there was a Difference between a Limitation over to a particular Person a Stranger, and when it is directed to sink into the *Residuum* of the Estate; and in the last it is esteemed *in terrorem* only, and occasions no Forfeiture, tho' such Consent is not obtained; and to prove this Distinction he cited 2 *Vern.* 293. *Garrett* versus *Pritty*.

Counsel

Counſel on the ſame Side cited the Caſe of *Pamtori* verſus *Berry*, before the Maſter of the Rolls; which was a Legacy deviſed to a Perſon, provided ſhe married with the Conſent of *A.* and *B.* and if ſhe married without ſuch Conſent, Limitation over to another. *B.* died before the Marriage, after the Legatee married without the Conſent of *A.* and there held ſhe ſhould have the Portion notwithſtanding the Limitation over. To which the Court anſwered, the Conſent of *A.* and *B.* was jointly made neceſſary; and by the Death of *B.* that becoming impoſſible by the Act of God, the Condition was therefore intirely diſpenſed with.

Solicitor General *cont'*: All the Caſes cited are only as to perſonal Legacies; but this differs, becauſe it is a Condition annexed to a real Eſtate, and the Conſent is a Condition precedent, to be performed before the Party can be intitled. And when there is ſuch a Charge upon a real Eſtate, the Diſtinction of a Limitation over and not, and the Difference alſo of its being limited to a particular Perſon, (24.) or being to ſink into the Surplus, fails. This therefore being a Charge upon the Lands, and the obtaining Conſent, being a precedent Condition not performed, the Legacy becomes forfeited. And the Maſter of the Rolls, being of this Opinion, diſmiſſed the Bill. *Vide ante.*

Note; There ſeems to be a Difference between Conditions precedent as to perſonal Legacies, and Conditions precedent as to ſuch Charges on Land. *Vide* as to ſuch Conditions annexed to real Eſtates, 1 *Mod.* 300. *Fry* verſus

versus *Porter*. 2 *Vern*. 333. & *vide* 1. *Roll. Abr*. 418. A Lease for Life upon Condition, that if the Lessee marry without Licence the Lessor may re-enter; and this was held a good Limitation.

Ex parte Riley, 5 Geo. II.

Mutual Debts set against each other in a Commission of Bankruptcy.

THE Petitioner was indebted to *Woodward* a Banker upon Account of Cash-Notes that he had accommodated him with, and whilst he was so indebted *Woodward* became a Bankrupt, and the Assignees under the Commission against *Woodward* had brought an Action against *Riley* for the Money; it happened that *Riley*, against whom the Action was brought, and one *Chapman*, who were joint Partners, were Creditors of the Bankrupt *Woodward* on other Accounts, more than *Riley* on his own separate Account really owed to *Woodward*; therefore *Riley* insisted, as there was a mutual Credit between him and the Bankrupt, one Debt should be set against the other; and that it would be hard, that Assignees under the Commission should recover the whole against him, and he and his Partner come in only under the Commission proportionably for what *Woodward* owed them with other Creditors. It was insisted for the Petitioner, that altho' the 5 *Geo*. 1. as to mutual Credit was expired, yet this Case was within the Equity of the Statute 2 *Geo*. 2. for Relief of Insolvent Debtors, whereby mutual

tual Debts are to be set one against the other, upon Notice given, *&c.* and that it had lately been determined in a Case where *Woodward*'s Assignees were Parties, that a Debtor of *Woodward*'s, tho' a Creditor in other Respects, should have one Debt set against the other upon the Foot of mutual Credit by the Commissioners.

It was said on the other Side, that joint Debts cannot be set against a separate Demand due to the Bankrupt.

King Chancellor was of Opinion, that this Case was not within the Meaning of the Statute 2 *Geo.* 2. of one Debt being joint and the other separate; but if *Woodward* had been indebted to *Riley* singly, he thought that was (25.) a mutual Credit within the Statute. And tho' in such Case the Statute speaks only of setting one Debt against another upon Trials, yet Commissioners of Bankruptcy are within the Equity of the Statute, and may allow of mutual Debts being given in Discharge upon the Demand of Assignees.

Dux Chandois *ver.* Talbott, 5 Geo. II.

THIS was a special Matter for the Judgment of the Court upon the Master's Report, and the Question was, if a Sum is devised to *A.* to be paid him at twenty-one, and the Testator charges his real and personal Estate with the Payment thereof, and the personal Estate falls short, and *A.* dies before twenty-one

twenty-one Years of Age, whether in ſuch Caſe the Legacy is lapſed and merged for the Benefit of the Heir at Law.

Legacy, whether lapsed and merged.

Solicitor General took the Difference between a Legacy given at twenty-one, and payable at twenty-one; with reſpect to a perſonal Legacy, when it is given to be paid at twenty-one, then it is a veſted Intereſt; and the Courts of Equity have with Regard to perſonal Eſtates followed the Rules of the Eccleſiaſtical Court in that Particular: But with reſpect to real Eſtates it is otherwiſe; and if in ſuch Caſe the Legatee dies before he is twenty-one, it is a lapſed Legacy, and ſhall ſink into the Land and be merged for the Benefit of the Heir at Law; but in the Caſe of a Legacy meerly perſonal, it would go to his Repreſentatives. And of this Opinion was *King* Chancellor, and ordered accordingly. *Vide* 2 *Vern.* 92, 248, 416, 457. 2 *Vern.* 72. 2 *Vern. Pawlet* verſus *Dogget*, 86. *Dy.* 59. *b.* 15. 2 *Salk.* 415.

Penderil *verſus* Penderil, 5 Geo. II.

Petition that a Depoſition in the Cauſe might be amended.

THIS Cauſe ſtood in the Paper for Hearing, and the Plaintiff applied to *King* Chancellor by Petition, that a Depoſition taken in the Cauſe might be amended upon an Affidavit of the Witneſs; the Examiner had miſtaken him in the following Manner: "The "Witneſs had been examined when he ſaw "ſuch a Perſon;" and it was taken down in the

the Deposition, "About six Weeks after the "Marriage of the Man inquired after;" whereas the Witness in his Affidavit swore that he said, "About six Weeks after the Fire "which happened in *Drury-lane* about *August* 1727.

(26.) *King* Chancellor, upon hearing the Depositions and Affidavits of the Witnesses, ordered the Witness who was present in Court to be sworn, which was done, and the Man examined, and, the Examiner attending, his Deposition was amended instantly, and the Cause proceeded.

But the like Application being made between the Seals in a Cause between *Traherne* and *Burdus*, he denied it, and said this Matter must be stopt in Time.

Mortimer *versus* Mortimer, Pasch. 5 Geo. II.

Devise with Limitations.

HENRY *Smith* by his Will devised all his Lands, Tenements and Hereditaments whatsoever, whereof he was seised and possessed of, to Trustees for 1000 Years, in Trust to permit and suffer *James* his Son and his Issue to enjoy the Lands, and to receive the Profits during the said Term; but if his Son should die leaving no Issue extant or ensient, then to permit and suffer his Daughter *Anne* and her Issue to enjoy the Lands, and to receive the Profits during the Term; and if his said Daughter *Anne* die, leaving no Issue extant

extant or ensient, then to *Michael Smith* his Cousin, *ut supra*. *James* survived *Henry*, and died leaving no Issue, and appointed his Wife Executrix. *Anne* the Sister of *James*, and Daughter of the Testator, died in the Life-time of her Brother *James*, leaving Issue *Anne Mortimer* the Plaintiff; the Father of *Anne Mortimer* took out Administration of the Goods and Chattels of his Wife *Anne* deceased.

Whether Leasehold Lands pass by this Devise, or only his Freehold Estate, &c.

In arguing this Case three Points arose, 1*st*, Whether the Leasehold Lands of the Testator passed by his Devise, or only his Freehold Estate. 2*dly*, The Limitation to *Anne* the Daughter, in the Manner it is limited, is a good Limitation or not? and 3*dly*, Whether the Administrator of *Anne* the Daughter of the Testator, or *Anne* the Daughter and Issue of *Anne*, shall be intitled to the Term.

Counsel, as to the first Point, objected, that by a Devise of all Lands, *&c.* generally the Freehold Lands only, and not the Leasehold Lands of the Devisor, will pass. *Cro. Car.* 293. But in case the Testator had no Freehold Lands, the Leasehold Lands will then pass. 2 *Danv. Abr.* 527. In this Case the Testator appears to have both Freehold and Leasehold Lands. The Testator was possessed of a Term for ninety-nine Years, determinable on the Death of a third Person, which he never had in his Intention to pass. If a Man seised of Freehold Lands, and possessed of a Term, grants a Rent-charge, the Rent is issuing out of the Freehold Estate only. 1 *Inst.* Indeed the Leasehold Lands are liable to a Distress. (27.)

As

As to what is said, that the Word *seised* passes as to the Premisses that are Freehold, and the Word (*possessed*) the Leasehold. It is not in the Disjunctive seised (*or*) possessed, but in the Copulative, (*and possessed*); and a Man, if the Strictness of the Words are to be regarded, is seised and possessed of Freehold Lands if he is in Possession. The Term of 1000 Years, limited by his Will to the Trustees, is created out of the Reversion in Fee the Testator had expectant on an Estate-tail.

King Chancellor: This is a Devise of all the Testator's Freehold and Leasehold Lands; it appears by the Proofs in the Cause, that the Testator had only one House which was Freehold, and he takes Notice in his Will, that the House was only Part of the Premisses devised; he must therefore intend to pass his other Lands which are Leasehold. 2*dly*, The Limitation over to *Anne* the Testator's Daughter is also good; for this is not a Limitation of a Term, after a general Dying without Issue, which would be undoubtedly bad, but after a particular Dying without Issue, by reason of the Words (*extant* and *ensient*; *extant* implies without Issue at the Time of his Death, *ensient* is applicable to his Wife's being with Child at the Time of his Death. A Devise to an Infant *in Ventre sa mere* is a good executory Devise. *Salk.* 230. This therefore is a good executory Devise to *Anne*, tho' it would have been void as a Remainder. *Vide ante.*

3*dly*, Notwithstanding *Anne* died in *James* her Brother's Life-time, yet this Term shall now

now go to her Representative, and not to her Issue. *James* had the whole Term in him whilst he lived, subject to a Contingency.

Papillion *versus* Voice, *At the Rolls*, July 15. 1728. 2 Geo. II.

(Reheard *Hill.* 5 *Geo.* II. *Vide post.* 59.)

Personal Estate devised in Moieties.

THE Case was as follows: *Samuel Papillion*, being possessed of a considerable Personal Estate, by his Will *Oct.* 7. 1725. devised a Moiety of his Personal Estate to his Son the Plaintiff, and the other Moiety to the Defendant *Voice* and others, in Trust, that as soon as conveniently might be after his Death, to lay it out in Lands and to convey and settle the same, to the Use of the Plaintiff *John Papillion* for Life, *sans* Waste; and from and after the Determination of that Estate, to the Use and Behoof of the Trustees, during the Life of *John Papillion*, to preserve contingent Remainders from being barred; and from and after the Decease of his said Son, to the Use of the Heirs of the Body of his said Son *John Papillion* lawfully to be begotten; and in Default of such Issue, to the Use of the Children of the Testator's late three Sisters, *Phœbe Smith*, *Mary Pell*, and *Anne Gledhil*, as Tenants in Common, and the Heirs of their Bodies, (each of the said Testator's three Sisters Children to have an equal third Part,) and for Default of such Issue, to the Testator's own right Heirs.

(28.)

And

And after, by the Teſtator's ſaid Will, he deviſed to the Defendant *Voyce* and others, all that his Manor of *Great Bentley* and other Lands, to the Uſe of his ſaid Son *John Papillion* for Life, *ſans* Waſte; and from and after the Determination of that Eſtate, to the Uſe of the Defendant *Voyce* and two others and their Heirs, during the Plaintiff's Life, to preſerve contingent Remainders; and from and after the Plaintiff's Deceaſe, to the Uſe of the Heirs of the Body of the Plaintiff; and in Default of ſuch Iſſue, to the Uſe of the Children of the Teſtator's three Siſters, *P.S. M.P.* and *A.G.* deceaſed, and to the Heirs of their Bodies, as Tenants in Common, (each of his three Siſters Children to have an equal Part,) and in Default of ſuch Iſſue, then to his own right Heirs; and after directs, that the Plaintiff, in caſe he married, ſhould have a Power to make a Jointure, as well of the Lands to be purchaſed as of the Lands devised, proportionably to the Portion he ſhould receive; and if he married with Conſent of Truſtees, that then he might make any Settlement whatſoever.

The Teſtator made the Defendant *Voyce* and the other Truſtees his Executors, and died; each of the Teſtator's Siſters left ſeveral Children, Defendants in the Cauſe; and the End of the Plaintiff's Bill was to have the Moiety of the Perſonal Eſtate deviſed to the Truſtees either paid to him, or laid out in Lands to be ſettled on the Plaintiff in Tail.

Solicitor General and Mr. *Lutwyche pro Quer'* That the Uſes of the Lands to be purchaſed,

chased, being the same as the Uses limited of the Manor of *Great Bentley* devised by the Will, and which is an Estate-tail executed in the Plaintiff, the Court ought therefore to direct the Uses of the Lands to be purchased to be limited accordingly. They agreed, was this the Case of executory Marriage-Articles, it would be otherwise; and the Court in directing the Form of the Conveyance, instead of being limited to the Heirs of the Body of the Plaintiff, would direct the Limitation to be, to the first and other Sons, *&c.* because such Articles are made upon a Consideration; and the Court will therefore in such Case take Care of the Issue, and not put it in the Power of the Father to bar them, and therefore will not direct such a Settlement to be made as the Father may defeat the next Day. (29.)

But in the Case of a Will all is voluntary, and there this Court will not help further than the Law does. The Words in a Will must have their legal Operation, and the Court must take them as they find them; and for this Distinction between Articles and a Will was cited 2 *Vern.* 670. *Baile* versus *Coleman*, 2 *Vern.* 702. 2 *Vern.* 551. *Legatt* versus *Sewell*; and *vide ibid.*

When Money is devised to be invested in Lands and settled in Tail, how far the Party, on whom such Settlement in Tail is to be made, can demand the Money before any Settlement. The next and chief Point was, whether, in case the Lands were purchased and settled as the Will directs, the Plaintiff would be immediate Tenant in Tail or for

Life only? And as to that, the same Uses being limited as to the Lands to be purchased, as are of the Lands actually devised, all falls under one Consideration; and as the Plaintiff is Tenant in Tail by the Will of the Lands devised, consequently he will be so of the Lands to be purchased, and that notwithstanding the express Estate given to him for Life. And they relied on the Rule laid down in *Shelley*'s Case, 1 *Rep.* 104. *a.* viz. *That whenever an Estate of Freehold is limited to one, and after by the same Gift and Conveyance an Estate is limited either mediately or immediately to his Heirs in Fee or in Tail*, viz. *To his Heirs or the Heirs of his Body; the Heirs cannot make themselves Purchasers, but must take by Discent, and this, tho' ever so many particular Estates be limited between*; which comes exactly to the present Case; for *John Papillion* has in the first Instance an Estate of Freehold for Life, and then, notwithstanding the intermediate Estate to Trustees, the Words (*Heirs of his Body*) must be words of Limitation; this Rule has never been denied to be Law; if, therefore, upon Construction of all the Uses, the Court should be of Opinion that the Plaintiff takes an Estate-tail, then the Court will decree a direct Limitation to the Plaintiff in Tail, and not direct a Conveyance contrary to the Words of the Will; and to this last Thing his Honour agreed; saying, it was the Office of this Court to quiet, and not create Disputes.

A. G. and others, Counsel for the Defendants, said little or nothing as to the first Point;

Point; but argued chiefly, that by the Limitation in the Will the Plaintiff had only an Estate for Life in the Lands devised, and would have no more in the Lands to be purchased; did not deny the Rule in *Shelley's* Case, but said that Rule goes only to Limitations by Deeds; and that a greater Latitude is allowed in Constructions in Wills; for the same Words shall have one Construction in a Deed and another in a Will; as a Devise to (30.)
A. for ever is a Fee in a Will; but only an Estate for Life in a Deed, for want of the Word *Heirs*. So a Devise to *J. S.* and his Issue in Tail, is an Intail in a Will; but otherwise in a Deed: So to *J. N.* and his Heirs Male, is an Intail in a Will; *aliter* in a Deed.

And here are many Circumstances in this Will to shew the Testator only intended the Plaintiff should take an Estate for Life. As the Clause without Impeachment of Waste. The Limitation to the Trustees to perform contingent Remainders will be nugatory, if the Limitation to the Heirs of the Body of the Plaintiff are not construed contingent Remainders; (and had this Clause been in the Case of the *King* versus *Melling*, that would have been adjudged an Estate for Life;) and also the Power to make a Jointure. All these Particulars, besides the express Estate for Life, demonstrate what was meant by the Words (*Heirs of his Body*). *Vide* 2 *Salk.* 679. *Broughton* versus *Langley*. 1 *Lutw.* 823. S. C. 1 *Salk.* 224.

Jekyll M. R. This is a Case of great Con-

ſequence and Difficulty; and would take Time to Conſider of it. But to break the Caſe, as to Conſideration of the Limitation of the Perſonal Eſtate. In the caſe of *Bail* verſus *Coleman*, Lord Chancellor *Cowper* held, that the Truſtees ſhould execute as in Caſe of Articles; but Lord *Harcourt* afterwards held the contrary, and with good Reaſon. 2 *Vern.* 536. *Sweetapple* verſus *Bindon*; there the Difference alſo which has been taken between a voluntary Deviſe and Marriage-Articles is agreed. The Rule of Conſtruction of Wills muſt be governed by the Intent of the Party, conſiſtent with the Rules of Law, *i. e.* the Rule of Law that has been received in Conſtruction of Wills, and not of Deeds; for there are many differences that have been adjudged between them according to the Caſes cited. The Limitation of the Money in this Caſe to be inveſted in Land, muſt enſue the Conſtruction of the Deviſe of the Lands; but it is too general to lay it down, that it muſt be in the ſame Words.

As to the main Point, I would ſee if there were any Caſes where an Eſtate is deviſed for Life, with Remainder in the ſame Will to the Heirs of the Body of the Deviſee; with Circumſtances ſhewing the Teſtator intended only an Eſtate for Life; that the Heirs of the Body have taken by Purchaſe. As to the Caſe of *Peacock* and *Spooner*, 2 *Vern.* 43, 195. which was cited to ſhew, that the Words *Heirs of the Body*, were held Words of Purchaſe, was diſſatisfied with that Reſolution, and ſaid, that ſtood on its own Bottom; and that

that Terms for Years was not within 11 *Hen.* 7. *c.* 10. and that *Webb* and *Webb*, 2 *Vern.* 668. was cited by the Counsel as resolved contrary: He stated the Case of *Peacock* and *Spooner*; and it was a Term for Years settled by the Husband; and being a Settlement *ex provisione viri*, was within the Reason, and therefore within the Equity of 11 *H.* 7. against Discontinuances of Wills: But it seems a great Stretch to extend by Equity an Act of Parliament made in a particular Case touching Lands, to Terms for Years. *Note*; This Circumstance in the Case of *Peacock* and *Spooner*, *viz.* Of the Term being settled by the Husband, and which was the Reason that governed the Resolution, is not reported in *Vernon*, nor the Statute of *H.* 7. mentioned, which seems a great Omission. That of *Webb* and *Webb*, which was resolved contrary, was also a Case of the Right of the Husband, and not of the Wife. (31.)

Afterwards the *Master of the Rolls*, *viz.* on the 11th of *December* 1728. after very great Consideration, delivered his Opinion to the following Effect:

He made two general Questions, 1*st*, Whether the Words (*Heirs of the Body*) in this Case were Words of Limitation or Purchase. 2*dly*, How far the Court, in directing the Uses of the Settlement, was bound to follow the Words of the Will?

As to the first, they are Words of Purchase in the present Case; if they are to be taken as Words of Limitation, they denote only the Quality of the Estate; but if Words of Purchase,

chase, then they denote a contingent Remainder; to the first Son of the Plaintiff which is agreeable to the Words of the Will. The great Objection is the Rule in *Shelley*'s Case, 1 *Rep.* 104. That if the Eldest should take by Purchase, that might prevent all the other Sons from taking an Estate-tail in Succession, contrary to the Testator's Intention.

This was denied by Lord *Macclesfield* in *Trevor* and *Trevor*, *Trin.* 1719. (10 *Mod.* 436.) and 1 *Inst.* 26. *b.* is a direct Authority against it. I hold, that in the Case of Wills the Intention of the Party is principally to govern. 8 *Rep.* 95. *b.* *Salk.* 237. *Countess of Bridgwater*'s Case; this Rule of the Intent of the Testator being to govern in Wills is universal, and will prevail over all particular Rules. I agree, his Intention must conform to the Rules of Law, *Hob.* 32. *Counden* versus *Clerke*; and therefore we are to steer between two Rules. *Hob.* 32.

All the Cases, where the Rule of Law over-rules the Intention of the Party, are reducible to four Instances. 1*st*, Where the Devise would make a Perpetuity. 2*dly*, Where it would put the Freehold in Abeyance. 3*dly*, Where Chattels are limited as Inheritances. And 4*thly*, Where a Fee is limited upon a Fee.

But the Judges have favoured the two last Kinds, and have made Limitations of Chattels good for Lives in Being, tho' never so many; and helping the other by inventing executory Devises; a Motion not mentioned in the Old Books. 3 *Rep.* 19. *Boraston*'s Case.

But

But this Rule, that the Testator's Intent is to govern in Wills, is to be laid down with this Caution, *viz.* That the Intent must be clear and apparent. 6 *Rep.* 16, *b.* *Wild*'s Case; and there is no Instance where this has been contradicted. Consider the Cases which have been insisted on for the Plaintiff, and which seem contrary to this Rule. The Case of the *King* and *Melling*; and *Hale*'s Opinion, who founded himself on the supposed Intention of the Testator. 1 *Ventr.* 214, 225. and *vide* the Opinion of *Raymond* C. J. in the Case of *Shaw* and *Weigh*, with his Observations of the Case of *King* and *Melling*; but had there been in that Case, as there is in the present, a Limitation to Trustees to preserve contingent Remainders, *Hale* would never have said, that the Express Estate for Life, with all other the Circumstances of the Case shewing the Intention of the Testator, was ballanc'd by an apparent Intent which weighed as much on the other Side, (*& meâ equidem sententiâ*) that of *Hale*'s is a very absurd Opinion, to make such a collective Intent, *viz.* (that as long as *Bernard* should have Children, the Estate should never go over to *John*,) controul a plain and express Intent before, and about which there would be no Doubt. (32.)

The next is *Goodright* and *Wright*, *Hill.* 3 *Geo.* 1. (1 *Str.* 25) and *Goodright* and *Pullin*, *Mich.* 13. *Geo.* 1. (2 *Str.* 729.) Consider the Reason of the Rule in *Shelley*'s Case, that where the Ancestor takes an Estate for Life, his Heir cannot be a Purchaser. I apprehend the Reason to

to be, (tho' it is not mentioned in any Book,) that the Law concerning Fines of Inheritance in the Anceſtor, to prevent the Freehold's being in Abeyance and to avoid Diſcontinuances, and to prevent which the Limitation to the Truſtees for preſerving the contingent Remainders has been invented of late Years. *Q.* the Authorities to ſupport this Opinion.

Cro. El. 313. *Clerk* verſus *Day*; where Heirs of the Body were adjudged Words of Purchaſe. (*Note*; This Caſe is not rightly reported in any of the Books; and for the true Account of it, *vide* the Opinion of *Raymond* C. J. in the Caſe of *Shaw* and *Weigh* 2 *Str.* 804.) The Word *Heir* in a Will is to be taken either as a Word of Limitation & *nomen collectivum*, or as a Word of Purchaſe & *nomen ſingulare*. 1 *Rep.* 63. *Archer*'s Caſe. 3 *Lev.* 431. *Loddington* verſus *Kime*. *Mich.* 12. *Anne*, *Caſes in Law and Equity* (10 *Mod.*) 181. *Backhouſe* and *Wells*; and ſtated *per Raymond* C. J. in his Argument of *Shaw* and *Weigh*. In theſe laſt Caſes it has been adjudged, that the Anceſtor took only an Eſtate for Life; but it has been objected, that in all thoſe Caſes the Limitation is to the Iſſue. To this it is anſwered, that this is no Objection, ſince the Caſe of *King* and *Melling*, 1 *Ventr.* 231.

(33.) But a ſtronger Caſe yet is the Caſe of *Liſle* and *Gray*, 2 *Lev.* 223. *T. Jones* 114. Where Heirs of the Body in a Deed took by Purchaſe; and that Caſe was affirmed in *Cam' Scacc'*, *Nov.* 26. 30 *Car.* 2. *vide Pollexfen* 582; that goes far beyond the preſent Caſe. The Limitation to Truſtees to preſerve contingent Remainders is

is very ſtrong, to ſhew the Intent of the Teſtator; as if he had ſaid, that the Heirs of the Body of the Plaintiff his Son ſhould take by way of Remainder.

As to the ſecond Point, *viz.* How the Court ought to direct the Settlement to be made of the Lands to be purchaſed; he held it ought to be a ſtrict Settlement. The Plaintiff's Counſel would not have it in the very Words of the Will; becauſe then there muſt be a Limitation to the Truſtees to preſerve contingent Remainders. What an odd Thing would it be, for this Court to direct ſuch a Settlement which would certainly create a Suit; whereas the Decree of this Court ought to be clear and certain. Differences have been made in this Court, as to directing Conveyances upon Wills; the firſt Caſe as to this Matter is 2 *Vern.* 526. *Leonard* verſus *Earl of Suſſex.*

And there decreed, that an Eſtate for Life ſhould only be conveyed; and that is agreeable to the preſent Caſe. And this Settlement to be made in the preſent Caſe being only executory, and the Intent appearing clear and plain, the Plaintiff ought only to have an Eſtate for Life. 2. *Vern.* 551. *Legatt* and *Sewell* is alſo material to this Point. Agreed this Caſe differs from the Caſe of *Leonard* and *The Earl of Suſſex primâ facie*; but the Intent there is not ſo certain. *Paſch.* 1707. Sir *John Hobart* and *The Counteſs of Suffolk* 2 *Vern.* 644. Upon Sir *John Maynard*'s Will the Decree was, that the Money ſhould be laid out according to the Will and Act of Parliament.

Parliament. And upon exceptions to the Master's Report the Question was, whether the Settlement should be made in the Words of the Will? Lord *Cowper* declared, that in Matters executory in Articles and Wills, where Words are unformal, the Court will not follow the Words but the Intent; and in that Case, the Words being very plain to preserve the Estate in a strict Manner, accordingly a strict Settlement was decreed, with Limitation to Trustees to preserve contingent Remainders; and confirmed afterwards upon Appeal to the House of Lords. The Limitations in that Will plainly tending to a Perpetuity, and the Court went as far as possible; which shews how far the Court favoured the Intent.

The next Case is *Baile* and *Coleman*, 2 *Vern.* 670. *Pasch.* 1711. Lord *Cowper*'s Decree was reversed by Lord *Harcourt*, and upon good Grounds; and upon the Difference taken between Articles and Wills; for in
(84.) Wills, the first Taker is not to be made Tenant for Life only, without it is the apparent Intent of the Testator.

As suppose a Devise to Trustees to convey to *A.* and the Heirs of his Body, with Remainders over; the Intent does not appear that the Testator designed a strict Settlement.

The next is the Case of *Humberston* and *Humberston*, 2 *Vern.* 737. there decreed a strict Settlement; for the Reasons before mentioned. He held the Devise of the Manor of *Great Bentley* was only for Life; and therefore decreed, that the Writings of the Real Estate

Eſtate ſhould be brought into Court, and the Lands to be purchaſed ſhould be conveyed in a ſtrict Settlement.

Appeal brought Hill. 5 Geo. 2.

An Appeal was brought from this Decree *Hill.* 5 *Geo.* 2. before *King* Chancellor, and a Supplemental Bill came on alſo at the ſame Time, whereby the Plaintiff ſet forth, that ſince the former Decree he had diſcovered Marriage-Articles made on his Father's the Teſtator's Marriage, whereby he covenanted to ſettle the Manor of *Great Bentley*, and other Lands in the Will, to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of his Body; ſo that the Deviſe of the Real Eſtate was out of the Queſtion. The Decree therefore was varied as to the Manor of *Great Bentley*, *&c.* but upon the Conſtruction of the Will, my Lord Chancellor was of the ſame Opinion with the Maſter of the Rolls; and affirmed the Decree for a ſtrict Settlement.

Note; In the Caſe of *Williams* and *Brown*, *Paſch.* 7 *Geo.* 2. —— C. J. in citing this Caſe ſaid, that *King* Chancellor was clear upon the Appeal, as to the Manor of *Great Bentley*, that the Deviſee took an Eſtate-tail executed.

Attorney General *verſus* Hickman, 5 Geo. II.

Information for Performance of a Charity.

THIS was an Information exhibited by the Attorney General for the Performance of a Charity, given by a Codicil annexed to the

the Teſtator's Will, by which he deviſed, that what ſhould remain, and be the Reſidue of his Eſtate and Effects, be given for incouraging ſuch Non-conforming Miniſters as preach God's Word in Places where the People are not able to allow them ſufficient and ſuitable Maintenance; and for the incouraging ſuch as are deſigned to labour in God's Vineyard as Diſſenters; and appointed two Perſons to have the Diſpoſal and Appointment of the ſaid Charity, both which Perſons died in the Life-time of the Teſtator.

(35.) *Truſtees dying in the Life-time of the Teſtator whether a lapſed Legacy.*

Two Queſtions aroſe, 1*ſt*, Whether both the Truſtees, to whom the Diſposal and Appointment of the ſaid Charity was given, dying in the Life-time of the Teſtator, this Charity was not gone, and in the Nature of a lapſed Legacy?

But *per King* Chancellor: The Subſtance of the Charity remains notwithſtanding the Death of the Truſtees before the Teſtator; and tho' at Law it is a lapſed Legacy, yet in Equity it is ſubſiſting, and here is a ſufficient Certainty of the Teſtator's Intentions to revive it; the Intention of the Party therefore is ſufficiently manifeſt that this Charity ſhould continue within 43 *Eliz. c.* 4. It has been held, that if the Tenant in Tail deviſe a Charity, tho' no Recovery is ſuffered, yet that it ſhall take place and be effectual as an Appointment under 43 *Eliz.* 2 *Vern.* 453. *Attorney General* verſus *Rye & al'.* 2 *Vern.* 755. *Attorney General* verſus *Burdet & al'.*

The ſecond Point, Whether this be a ſuperſtitious Uſe within the Statute 1 *Edw.* 6. *c.* 14.

14. Non-conforming Ministers and Dissenters being such general Words, as that they comprehend any Persons however opposite to the Church of *England*.

King Chancellor: This cannot be a Superstitious Use within that Statute; but the Dissenters here meant are Protestant Dissenters acting under the Toleration-Act, 1 *W. & M. c.* 18. and decreed the *Residuum* to be disposed of *in præsenti*, and not in a perpetual Charity; and ordered a Scheme to be laid before him for that Purpose.

Pratt *versus* Pratt, *at the Rolls*, May 11. 1732. 5 Geo. II.

Distribution of Copyhold Estate of the Nature and Tenure of Borough English *Lands.*

PRATT C. J. being seised of a Copyhold Estate of the Nature and Tenure of Borough *English* Lands, surrendered the same to the Use of himself for Life, Remainder to his Wife for Life, Remainder to his own right Heirs, and died leaving several Sons and Daughters; and upon hearing this Cause, touching the Distribution of the Personal Estate, two Questions arose, 1*st*, Whether the youngest Son, to whom these Lands descended, should bring this into Hotchpot, within the Statute 22 & 23 *Car.* 2. *c.* 10. or come within the Exception of an Heir at Law?

2*ndly*, Whether this Estate, with respect to such younger Son, was to be considered as an Advancement of the Father?

His Honour in this Case was of Opinion, that

that the youngest Son was not Heir at Law within the Statute. Heir at Law is there to be considered and understood Κατ' ἐξοχὴν.

(36.) It was objected, that by the Words of the Statute, *viz. Other than such Child or Children not being Heir at Law;* it is plain, there may be Children which may be deemed Heir at Law besides the eldest Son; but the Words there mean 'other than such younger Child 'or Children.' *Executio probat Regulam.* He also thought this a Settlement by the Testator, and decreed he should be brought into Hotchpot according to the Statute.

Eastgood *versus* Styles, 5 Geo. II.

Bond given by a Husband before Marriage to settle Freehold Lands.

A Bond was given by a Husband before Marriage, whereby he agreed, within four Months after his Marriage, to settle upon his intended Wife Freehold Lands for her Life, worth 100*l. per Annum*, Remainder in Tail to the Issue of the Marriage; or in Default thereof his Heirs or Executors to pay her 2000*l.* The Husband died within four Months after the Marriage, leaving Assets, and by Will gave his Wife an Inconsiderable Freehold, *viz.* One House and Copyhold of Inheritance amounting to 85*l. per Annum.*

A Bill was brought by the Creditors and Legatees of the Husband, to compel the Wife to accept of the 100*l. per Ann.* only, exclusive of what was given her by her Husband's Will; or else, that what was given her by

by the Will might be deemed a Satisfaction of the Bond. And by the Counsel for the Plaintiff it was insisted, that if the 85*l.* *per Annum* was not to be esteemed a compleat Satisfaction of the Bond, yet that it ought to go *pro tanto*. Decreed *per Jekyll*, that the Widow was not intitled to the 2000*l.* but the Heir should convey the 100*l.* *per Annum* to her, and that she should also have the Lands of 85*l.* *per Annum* devised to her by the Will.

The Plaintiffs appealed from this Decree, and the Counsel *pro Quer'* cited the Case of *Bird* and *Young*, 1723. in Chancery, which was a Bond before Marriage conditioned to leave the Wife an Annuity of 250*l.* *per Annum*, and the Husband died about a month after Marriage, and devised her Lands of 120*l.* *per Annum* for Life, leaving Assets; held *per Price* J. who heard the Cause, that it should be deemed a Satisfaction in Part of the 250*l.* *per Annum*. Reheard by *Macclesfield* Chancellor, who varied the Decree; but upon Appeal to the Lords, Justice *Price*'s Decree was confirmed.

The following Cases was cited, *Blandy* and *Widmore* 2 *Vern.* 709. *Wilcocks* versus *Wilcocks* 2 *Vern.* 558. and *Savile* and *Savile*, which (37.)
was relied on for the Defendant; *vide Mod. Cases*. Vol. xi. case 416.

King Chancellor thought this Legacy was intended as a Bounty, and not as a Satisfaction; he considered when Devises of this Nature had been construed as a Satisfaction, and when not; the Devise, when it goes in Satisfaction must be of the same Nature with the

the Thing to be performed; not Money in ſtead of Lands, nor *vice verſa*; nor, as in the preſent Caſe, Copyhold Lands inſtead of Freehold; for in thoſe Caſes it is to be looked on as a Bounty; the Deviſe muſt alſo be a compleat Satisfaction, and not a partial one of an inferior Value, for ſuch could never be intended a Satisfaction. He therefore affirmed the Decree.

Painton *verſus* Berry & *Ux'*, & *al'*, *Adminiſtrators* of Thornton *deceaſed*, May 6. 1732. 5 Geo. II.

Legacy with Proviſo a Perſon marries with Conſent of two Perſons.

T*Hornton*, Uncle to the Defendant's Wife *Berry* who was his Niece, by his Will gives the Intereſt of his Perſonal Eſtate to his Mother for Life, and then deviſed 100*l.* Legacy, & *inter alia*, 500*l.* to *Francis* the now Defendant, and 10*l.* alſo for Mourning; and then as to the Reſidue, he gave the ſame to his ſaid Niece, provided ſhe marry with the advice and conſent of Mr. *Lyddall* and Mr. *Clarke*; and in caſe ſhe happen to marry otherwiſe, he deviſed the ſame to the now Plaintiff *Painton*; one of the Perſons named, *viz. Clarke*, died ſoon after the Teſtator, *viz.* in 1713. and afterwards in 1729. the Defendants *Berry* and his Wife intermarried without any previous Application made to the Survivor *Lyddall* for his Conſent. This Bill was therefore brought againſt the Adminiſtrator, &c. to have the *Reſiduum* given over to the Plaintiff

Plaintiff on this supposed Forfeiture, the Marriage being without Consent. *N.B.* The Defendant *Berry* denied by her Answer she had any Notice of the Devise or Proviso when she married, and it was not proved she had. The principal Question was, whether this was a Condition precedent or subsequent, *viz.* Whether it was to be performed before the Legacy of the *Residuum* vested; or only a Condition subsequent to divest the Interest?

For the Plaintiff it was insisted, that this was a Condition precedent; and it was compared to the Case of *Fry* and *Porter*, 1 *Vent.* 199. and *Falkland* and *Bertie*, 2 *Vern.* 333. And it was argued, that *Clarke* and *Lyddall* were in the Nature of Guardians, and that (38.) the Power given to them survived; and it was the Intention of the Testator to continue his Care over to his Niece till she should marry; and she ought to have applied to *Lyddall* the Survivor for his Consent; and cited the Case of *Rogers* and *Pain*, *May* 14. 1728. Where a bond had been entred into by the Husband on an intended Marriage, in Consequence of an Agreement with the Father of the Wife, and a Portion of 1000*l.* the Condition of which was to pay 1000*l.* to a Daughter of the Marriage within so many Months after her Marriage, provided it was with the Consent of four Persons, or the major Part of them: In that Case two of the four Persons died, and the Daughter married without the Consent of the Survivors; and a Bill being brought against the Father the Obligor for the 1000*l.* it was dismissed; because the Daughter had

not done all ſhe could, by aſking the Conſent of the Survivors. And even ſuppoſing this a Condition ſubſequent, it was not impoſſible to be performed in Subſtance; as in 1 *Inſt.* 220. *b.* A Feoffment on Condition to inſeoff the Feoffor, his Wife and their Heirs, where if the Wife dies a Re-infeoffment ſhall be made to the Feoffor and his Heirs.

Solicitor General *cont'*: This is a Condition ſubſequent; there are no preciſe Words or any Method of placing a Condition that can diſtinguiſh it from being precedent or ſubſequent; but whether it is or not muſt be collected from the Conſent and Intent of the Parties. Here the Reſidue on the Death of the Mother muſt veſt in the Defendant immediately, tho' unmarried; for it cannot go over to the Plaintiff, but upon the Defendant's Marriage Contrary to the Directions in the Will; and if the *Reſiduum* did not veſt in the Defendant upon the Mother's Death, the Teſtator with Reſpect to ſuch Reſidue muſt be ſaid to die Inteſtate.

The Proviſo therefore is a Condition ſubſequent and to diveſt an Intereſt; and the Death of one of them two Perſons whoſe joint Conſent was requiſite, makes ſuch joint Conſent impoſſible; and ſuch Conſent is not, as was ſaid, an Intereſt that would ſurvive, but a meer naked Power; and there can be no Doubt, but a Condition ſubſequent, becoming impoſſible by the Act of God, muſt be diſpenſed with, and the Deviſe over to the Plaintiff is therefore become void. The Caſe of *Fry* and *Porter*, and *Falkland* and *Bertie*, were

were of Real Estates, and this only the *Residuum* of a Personal Estate, which is to be governed by the Rules of the Civil Law.

Conditions in Restraint of Marriage are void by the Civil Law; but this Court has admitted of some Restrictions with respect to Marriages under certain Limitations. But in the present Case here is a beneficial Interest vested to be divested on the Non-performance of a subsequent Condition, which is now become impossible, and is therefore such a Restraint on Marriage as is void both by the Civil and Common Law. (39.)

The Bill of the Rolls was dismissed with Costs; and *per King* Chancellor, being of the same Opinion, affirmed the Decree as to the Point in Question, but reversed it as to Costs.

Lord Warrington *versus* Lee, May 14, 1732. 5 Geo. II.

Bill brought for Satisfaction for 2000l. by a simple Contract Creditor.

ON an Appeal from the Rolls this Bill was brought by the Plaintiff to have Satisfaction for the Sum of 2000*l.* for which he was only a Simple Contract Creditor; and the Question was upon the following Words of a Will, whether the Testator had subjected his Real Estate to the Payment of his Debts? the Words were these,

"As to all my worldly Estate, which it has "pleased God to bless me with, I give and "dispose of the same in the Manner and Form "following, that is to say, *Imprimis*, I will

" that all my Debts be discharged and paid "; and then devises Lands, *&c.* to particular Persons. The Testator died leaving a great Real Estate, but little or no Personal. Decree at the Rolls, that the Real Estate was not liable. It was argued *pro Quer'*, that the Words (*worldly Estate*) comprehended as well the Real as the Personal Estate, and meant all the Testator had in the World. It was the Testator's Intention, that before any Person should take any Part of his worldly Estate, that his Debts should be first paid and discharged. Indeed if a Man directs by Will generally that his Debts shall be paid, it is no more than what the Law says, and his Personal Estate, which is the proper Fund, shall only be liable. But here these Words are not to be Considered as of Course, but manifest a plain Intent to subject the Real Estate to the Payment of the Testator's Debts. It is said, the Word made use of by the Testator is (*give*), which is applicable only to Personals, and not (*devise*), which is properly relative to Lands. But to prove this makes no Difference they cited 1 *Vern.* 411. *Clowdsley* versus *Pelham*; there the Words were, (*willing*) *his Debts should be paid*; and held the Real Estate liable; so here it is (*I will*). Besides, in another Part of the Will, when the Testator is giving away the Plaintiff's Estate and other Personals, he makes use of the Word (*Devise*), which shews he never understood any Difference between the Words.

(40.) The following Cases were cited, 2 *Vern.* 708. *Trott & al'* versus *Vernon*; 2 *Vern.* 228.

Alcock

Alcock versus *Sparhawk*; 2 *Vern.* 690. *Beachcroft* versus *Beachcroft*; which last was relied on as a Case in Point, tho' it was objected, that the Word *Remainder* in that Case, *viz. Out of the Remainder of my Estate I give*, &c. shewed a precedent Devise of it before; and the Case of *Harris* versus *Ingleden*, 10 *March* 1730. (3 *P. Wms.* 91) at the Rolls; *William Ingledew* by Will devised in these Words, "And as "touching such worldly Estate which God has "blessed me with, my Debts being first paid "and satisfied, I will and devise the same in "Manner following". And in that Case, a Bill brought by a Simple Contract Creditor, (the Personal Estate not proving sufficient,) it was decreed, the Freehold and Copyhold were both liable. In the Civil Law, as in the Case of Bankruptcy here, there is no Priority of Superiority of Debts, and in Conscience they are all the same, and that is the Foundation this Court goes upon when the Intent is clear.

Counsel for the Defendant: The Real Estate is not liable to the Plaintiff's Demand; and if such general Words as are here, were to be construed to affect Real Estates, it would render the Titles of all Persons claiming under Wills very precarious. He said, that after the Clause in the Will whereby the Defendants are directed to be paid, the Will goes on, *Item*, "I give to *M. S.* an Annuity of 100*l.* "*per Annum*, to be paid out of my Manors, "*&c.*" He admitted, the Words (*worldly Estate*) were large enough to affect the Real as well as Personal Estate; but the Question is here

here, Whether it was the Teſtator's Intent to charge both? and it is plain it was not; that general Direction of ordering all his Debts to be paid, is no more than what the Law ſays, and therefore *Expreſſio eorum quæ tacitè inſunt nihil operatur*. But here it is ſaid *Imprimis*, which is inſiſted to be of the ſame Import as in the firſt place, and that therefore imports a Priority to be done; and therefore ſay the Counſel for the Plaintiff, the Lands are therefore deviſed upon Condition, that my Debts be paid out of them in the firſt place. But the Word *Imprimis* has no ſuch Import, it only denotes the Order of ſpeaking, and ſerves for no other purpoſe than to diſtinguiſh the ſubſequent Deviſes that they ſhould not coincide. A Perſon cannot speak all his Words at once, and this therefore differs from all the Caſes cited, where it appears the Teſtator had an eye to his Real Eſtate. In the Caſe of *Beachcroft* and *Beachcroft*; there the Words were, (*Out of the Remainder of my Eſtate, and after my Debts paid, to my Wife*;) ſo that in that Caſe there is a plain Intent to charge the Land: So the Caſe of *Trott* verſus (41.) *Vernon*, and *Harris* verſus *Ingledew*; in both theſe Caſes the Words (*in the firſt place*) plainly ſhew the Teſtator's Intent; and there is no Caſe in all the Books where ſuch general Words in a Will, with a particular Charge on Lands afterwards, as in the preſent Caſe of an Annuity, have ever been held to make a Real Eſtate anſwerable for Debts; not one of the Caſes cited have any particular Charge laid on the Land.

Are

Are the Debts to be an Incumbrance to the Annuity charged on the Lands? the Testator by mentioning such particular Charge therefore shews his Intent only was to affect the Lands with that, and not with the Debts; besides, if the Words were doubtful, they ought not to be interpreted to the Disinherison of an Heir at Law; which is the present Case.

King Chancellor reversed the Decree, and held the Lands were liable to the Plaintiff's Demand.

Gordon *versus* Rains, 5 Geo. II.

Bill by the Husband as Administrator of his Wife, to recover 6000l. Portion vested in his Wife.

THIS was a Bill brought by the Husband, as Administrator of his Wife, in order to recover the Sum of 6000*l.* Portion, due and vested in his Wife; and the Question arose upon the following Trust of a Term; the Trust was declared to be, "That in case "there be no Son of the Marriage born in the "Life-time of *Henry Rains*, or after his De-"cease, or if there be, and all of them die "before the Age of twenty-one, and in either "Case there shall happen to be one or more "Daughters born in the Life-time of the said "*Henry Rains*, or after his Decease, who "shall attain the Age of sixteen Years; in "that Case the Trustees, after the Decease of "the said *Henry Rains* or *Elizabeth* his Wife, "shall by Demise, Sale, *&c.* or by Receipt of "the Rents, *&c.* raise and levy the Sum of "6000*l.* (which was the present Case,) to be "paid

" paid at the Age of ſixteen, in caſe either " *Henry* or *Elizabeth* ſhall be then dead."

There was alſo a Clauſe of Survivorſhip, in caſe of ſeveral Daughters, with reſpect to the Portion or Portions of any that ſhould die in the Manner therein mentioned. The Fact was: The Plaintiff's Wife was the only Iſſue of the Marriage, who lived till the Age of twenty-two Years, but happened to die before her Father or Mother *Henry* and *Elizabeth*, and they being alſo both ſince dead, this Bill was brought againſt the Defendant a Remainder-man for the ſaid Portion. And the Queſtion was, whether this Sum of 6000*l.* was veſted in the Daughter, ſo as to intitle the Plaintiff to it as her Adminiſtrator? It was argued for the Plaintiff, that this Sum of
(42.) 6000*l.* was a veſted Intereſt in the Daughter immediately upon her arriving at the Age of ſixteen, tho' not payable indeed till after the Deceaſe of *Henry* or *Elizabeth*; otherwiſe what can be the Meaning of the Words (*A Daughter who ſhall attain the Age of ſixteen*,) the Clauſe of Survivorſhip ſhews it was veſted, elſe how could it ſurvive?

A. T. &c. Counſel *cont'*: Upon the Truſts of this Deed the Plaintiff is not intitled to this Sum of Money; the Contingency, which was to intitle his Wife to it, not happening during her Life, (which was the Death of *Henry* or *Elizabeth* in the Life-time of the Daughter, after ſhe attained the Age of Sixteen.) He ſaid, it was now a general Rule not to be departed from, that wherever Portions are to be raiſed out of Lands, there is

no

no Difference between Vesting and the Time of Payment; for when they are to be raised out of Lands, they never are vested till they are become payable; but in the Case of Personal Legacies it is otherwise; there the above Difference is allowed, and upon the Death of the Party intitled, such Interest is transmissable to the Representative; and to prove this Distinction he cited *Poulet* versus *Poulet*, 1 *Vern.* 204. and 2 *Vent.* 366. S. C. and said, the first Time it was so settled was in a Case of *Brown* versus *Brown*. In the present Case therefore the Daughter's Portion was never raisable; the Contingency of Failure of Issue Male did not happen in the Daughter's Life-time, for *Henry* and *Elizabeth* were both then alive, and as long as they lived there was a Possibility of Issue Male, so that it could not be a vested Interest in the Daughter at her Age of sixteen, which is only Part of the Description; the whole Sentence must be taken together, which is, "Such Daughter as shall have "attained the Age of sixteen after the De-"cease of the said *Henry* and *Elizabeth*." As to the Question, if this 6000*l.* did not vest at the Age of sixteen, what can be the Meaning of those Words? Why the same Answer may be given as in all other Cases of this Nature, *viz.* it was to ascertain that she should not have it before; if she had died an Infant of six or seven Years old, or at any Time under the Age of sixteen, tho' her Father and Mother had been both dead, it would not have belonged to her in such Case till the Age of sixteen. The Clause of Survivorship does not necessarily

neceſſarily imply that an Intereſt muſt veſt in the firſt Taker; as if a Legacy deviſed to *A.* at the age of twenty-one, and in caſe he dies before that Time, to *B.* in this Caſe it ſhall go to *B.* tho' it never veſted in *A.* 2 *Vern.* 207. *Miller* verſus *Warren*, it is a new Gift.

King Chancellor, aſſiſted by *Raymond* C. J. and *Jekyll* Maſter of the Rolls, were all of the ſame Opinion, that the Bill ſhould be diſmiſſed. The *Attorney General* ſaid, in all the (43.) Caſes cited there were no Contingencies, or elſe, as in the Caſe of *Butler* verſus *Duncomb*, 2 *Vern.* 760. the Contingency had happened.

Morice *againſt* The Bank of *England*, Mich. Term. 6 Geo. II.

Motion to diſcharge an Injunction for Irregularity.

THE Plaintiff, as Executrix of her Husband *Humphry Morice* deceaſed, filed her Bill in this Court, and in April 1732. obtained an Injunction, upon the Defendants praying Time to Anſwer, but never ſerved it till the *September* following; the Defendants in the mean Time having got a Verdict at Law, and alſo put in their Anſwer in this Court; it was now inſiſted on for the Defendants, that this Injunction ſhould be diſcharged; becauſe the Plaintiff had acted irregularly, in not ſerving the Proceſs before the Anſwer came in, it being an Injunction for want of an Anſwer, and it is to be regarded only as an Injunction from the Service on the Party,

Party, and not from the *Teste*. Formerly it was the Practice, upon coming in of an Answer, that the Injunction was dissolved of Course, unless the Plaintiff made a special Motion for its Continuance. Compared it to a Writ of Error with too long a Return, which is upon that Account no *Supersedeas*.

On the other Side it was argued, that the Plaintiff is perfectly regular in serving his Injunction, which in this Case could only stay Execution, the Action being brought at Law before the Bill filed; it is an Injunction upon the Party till Answer and further Order; here has only been an Answer put in, but no further Order; the Defendant ought therefore, as in other Cases, to move for an Order to dissolve it *nisi*, and not move to discharge it absolutely.

King Chancellor: It is an Abuse of the Process of this Court to keep a Writ in a Person's Pocket so long and make no Use of it, and afterwards serve it on the Party. Discharg'd the Injunction, but gave Leave to the Plaintiff to move for an Injunction the next Seal upon the Merits; and in the same Cause it was moved, that the Defendants were guilty of a Breach of the Injunction by suing out a *Sci' fac'* upon the Judgment *Quando* Assets *acciderint*; and it was said such a *Sci' fac'* is in the Nature of a new Action, the former Suit was against the Executrix *in auter droit*, and this *Sci' Fac'* was in order to obtain Judgment *de bonis propriis*; but it was resolved that it was not a new Suit, but only a Continuance of the former.

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A

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Legacy. See *Charity, Will.*

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2. A

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**** The pagination refers to the Second Edition* (1764), *preserved in the margin of this Edition.*

FINIS.

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Action for Words.

ACTION for Words in *C. B.* Declaration ſets forth, that the Plaintiff was ſworn an Attorney in the Common Pleas according to the late Act of Parliament, and that being *well qualified for a Solicitor in Chancery*, he endeavoured to get himſelf admitted, but that the Defendant having ſpoken falſe, ſcandalous and malicious Words of him, *viz. that he could prove him guilty of Perjury and Forgery, and he deſerved to be tranſported*; he was by reaſon of this Aſperſion refuſed to be admitted, *&c.* for which he brought his Action, and Verdict *pro Quer'; upon which a Writ of Error is brought.*

Mr. *S.* Counſel argued for Plaintiff in Error, that where a Perſon is charged with ſeveral Facts in a Declaration, and *intire Damages* are given upon the *whole*, if it appears upon the *Record* that ſome of the Facts *are not actionable, the Judgment is erroneous*; in this Caſe there are Words in the Declaration

tion that are not actionable, *viz. You deserve to be transported.* To say a Man deserves to be transported is not actionable. *Yelv.* 10 & 34. Thou art a perjured Knave, and that will be proved by a Stake that stands between the Ground of *J. S.* and *J. D.* and adjudged not actionable, for tho' the first Words are actionable, yet they are so qualified by the *subsequent Words*, that an Action will not lie. *Poph.* 210.

Mr. *D.* Counsel *cont'*: In this Case there are *special Damages* laid in the *Declaration*, so that provided the Words were not actionable in themselves, *yet an Action will lie for the special Damages*; but admitting special Damages had not been alledged, yet the Words are actionable in themselves. Perhaps where the Words are general, without any Charge, as you deserve to be hanged, transported, &c. an Action will not lie; but it is otherwise when there is a positive Charge.

Per Cur': *Judgment must be affirmed*; the Words are not only actionable in themselves, but here are special *Damages alledged*, and we will not take it, that Satisfaction is made for the special Damage.

(58.) King *versus* Pownell, 5 Geo. II. *B. R.*

Information moved upon the libellous Matter.

INformation was moved for against the Defendant for sending the Prosecutor a Letter wherein were these Words, *viz. You are a Scoundrel, and defrauded the King of his Duty, I will prick you to the Heart, and call you to an Account.*

Account. The original Motion was made upon the Foot of a *Challenge*, but the Court inclining to think the Words did not import a Challenge, Information was moved for upon the Libellous Matter, *viz. You are a Scoundrel, &c.*

Cur' : The Words do not import a Challenge; but to call a Man a Scoundrel, and to reflect upon him in the Execution of his Office, is Matter of a libellous Nature, and deserves to be punished *by Information.* In *Barnardiston's* Case, *Trin.* 5. *Geo.* 2. Information was granted for sending a Letter to *B.* wherein were these Words, *You are a rascally Fellow and a Tom Fool, you had better have held your Tongue*; but *B.* was Lord of a Manor, and this Letter was wrote to him by a Copyholder. *The Court inlarged the Rule*, viz. *to shew Cause why an Information should not go for the Libel.* Note; *This was afterwards referred by Rule of Court.*

Perry *versus* Curtesan, Hill. 5 Geo. II. *B. R.*

ACTION, *&c.* Defendant pleaded a *sham Plea*, to which the Plaintiff demurred, and gave the Defendant the common Rule, *to join in Demurrer within four Days*; before the Expiration of the Rule, *the Plaintiff moved that Defendant should plead such a Plea as he would abide by*; this was opposed, and insisted upon, that the Plaintiff could not make

Sham Plea. Per Cur': *To plead such a Plea as he will abide by.*

make such a Motion which was *contra* to his own Rule, which gave the Defendant *four Days Time to join in Demurrer*; there never was such a Motion made before.

Cur': *There can be no Inconvenience in the Motion; on the other Hand, it looks like a Trick of the Defendant's to get over the Term; if the Demurrer stands, the Defendant will have the Benefit by it; if over-ruled, it is reasonable the Defendant should plead such a Plea as he will stand by, and then Trial may be had within Term.* And *per Cur'*: *The Defendant shall either stand by his Demurrer, or plead such a Plea as he will abide by.*

(59.) Catherold *versus* Cooper & *al'*, Hill. 5 Geo. II. *B. R.*

Treble Costs prayed.

IN an Action of false Imprisonment against the Defendant & *al'*, Commissioners of the Turnpike, Plaintiff was non-suited, and now the Defendants came and prayed treble Costs according to 12 *Geo.* 1.

Mr. *F.* Counsel: This Motion is now improper, the Defendants should have prayed it at the Trial; in some Cases the Act directs there must be the *Judges Certificate*, but there is no such Provision in this Act. To grant this Motion would be to *determine this Matter upon Affidavits without giving the Plaintiff an Opportunity to controvert the Facts.* The Court held, from the Nature of the Thing, that the Defendants should have prayed *treble Costs*

Costs at the Trial; but only made a *Rule to shew Cause*. *Vide post*. the Case of *Devenish* versus *Burton*, *Hill.* 7 *Geo.* 2. *Double Costs granted upon Motion*; per Cur'.

Minor *versus* Wilson, Hill. 5 Geo. II. *B. R.*

Error.

A Writ of Enquiry was made returnable a *Sunday*, and was executed upon the *Monday following*; and this was assigned for *Error*, and the Judgment *reversed*. *So determined Trin.* 3 *Geo.* 2. *Peach* versus *Pascall*, Vide 2 *Salk.* 626. *Harvy* versus *Broad*; ibid. *Davies* versus *Salter*. A Writ of Enquiry was returnable *Tres. Trin.* which was Sunday, and the writ was executed on the 14th which was Monday; and upon Error being brought, Judgment was reversed. *Vide post*.

At the Sittings in C. B. *at* Guild-hall *coram* Robert Eyre *Milite*, *inter* Beck *and* Timbrell, 5 Geo. II.

Action for Goods sold and delivered; Defendant (60.) *offered a Bond for Performance of Covenants in Evidence.*

ACTION for Goods sold and delivered, *&c.* the Defendant, in Discharge of the Debt, offered to give in Evidence a *Bond for Performance of Covenants*, and relied upon the 2 *Geo.* 2. *c.* 22. Sed per E. C. J. *This Statute does not extend to Debts of that Nature, viz.*

viz. to Bonds for Performance of Covenants upon Condition, *&c.* but only to *mutual Promises upon simple Contract, or to Debts upon Bond for Money absolutely; for the Act does not intend that the Penalty shall be given in Evidence, but the Principal only, with the Interest which is legally due upon such Bonds.* Vide *Stat.* 2. *Geo.* 2. *c.* 22. *ad pedem.* Vide *post. Bank of England* versus *Morice*, said there, Penalty was the Debt in Law.

Perry *& al' versus* Trefusis, Term. Pasch. 5 Geo. II. *B. R.*

Motion to set aside a Writ of Enquiry.

MR. *F.* Counsel moved to set aside a Writ of Enquiry. Action in *B. R.* upon a stated Account, and Judgment *pro Quer'*. *On the 8th of February* the Plaintiff gave Notice to have a Writ of Enquiry executed on the 17*th before the Sheriff*, between the Hours of *eleven and twelve*, but before that Time applied to *B. R.* to have the Writ executed before the Lord Chief Justice at the Sittings after Term; *and obtained a Rule to shew Cause the next Day; the Day following at two a Clock the Plaintiff served Defendant with the Rule, but the Defendant, not having sufficient Time to shew Cause, suffered the Rule to be made absolute, without making any Defence.* The Sittings began 15*th of February*, and were adjourned to the 22*d*, when the Writ (Defendant not appearing) was executed before the Lord Chief Justice *ex parte.* Mr. *F.* Counsel

Counsel insisted upon two Things, 1*st*, That the Rule to have the Writ executed before his Lordship was gained by *Surprise*, Defendant not having sufficient Time to make his *Defence* and shew Cause, Rule being served upon him only at 2 a Clock on the same Day it was made *absolute*. 2*dly*, That altho' the first Notice, to have the Writ executed before the Sheriff, was regular, yet the making Application to the Court to have it executed before his Lordship, was a *Waiver of the Notice*, and that *fresh Notice ought to have been given*; for in all Cases upon Executions, upon Writs of Enquiry, *eight Days Notice is necessary*, and this Notice must be *exclusive of one of the Days, and inclusive of the other*; whereas in the present Case, from the Time of serving the Rule, *both the Days are inclusive, and so the Notice irregular*.

To this it was answered and resolved *per Cur': That the first Notice of executing the Writ of Enquiry before the Sheriff being regular*, the Application to the Court was *no Waiver* of the Notice; nor was it *necessary to give fresh Notice, or appoint any particular Hour for the executing it*; the Court in these Cases take their own Time, and execute it when they think proper *within the Sittings*. This can be no Surprize upon the Defendant, he having had regular *Notice of executing the Writ before the Sheriff*: and *he likewise had Notice before the Motion, that the Court would be moved to have it executed before his Lordship*; so that altho' the Rule was only served upon the Defendant at two a Clock, being the Day the (61.)

the Rule was made absolute, *yet it could be no Surprize, because he had Time before the Service of the Rule, and sufficient Notice to prepare himself to shew Cause.*

Anonymus, Term. Pasch. 5 Geo. II. 1732. *B. R.*

General Rule of Court.

PER *Cur'*: The Court made a general Rule, *viz. That where any Person moves for an Information, and has a Rule* nisi, *if, upon shewing Cause, that Rule is discharged,* the Party who made the Motion *shall pay Costs:* Note; *This Rule was never strictly followed, but always held discretionary.*

Lampen *and* Hatch, Pasch. 5 Geo. II. *B. R.*

Action for Words; Judgment by Default.

ACTION *for Words;* Judgment by *Default; Writ of Enquiry executed;* 10s. *Damages given, and* 13l. *Costs* de incremento; *whereas by* 21 Jac. 1. c. 16 *there shall be no more Costs than Damages, when the Damages are under* 40s. Plaintiff moved that the Judgment might be *reversed for this Error.* The *Defendant prayed it might be reversed in Part only;* viz. *as to Costs,* but that it might stand as to the *Damages.*

Sed

Sed per Cur': *The Judgment is intire, and must be reversed* in toto.

Knock *ver*. Wilkins, Pasch. 5. Geo. II. *B. R.* (62.)

Assault and Battery.

ACTION of Assault and Battery; Plaintiff gave Notice of Trial but did not proceed; Costs were taxed by the Master, and before Payment the *Plaintiff brought a fresh Action.* Mr. *H.* Counsel *moved that all Proceedings might be staid till the Plaintiff had paid the Costs of the first Action.*

Cur': *You may have an Attachment for the Contempt, but we never stop Proceedings in these Cases, except in* Ejectment.

Whithall *versus* Sir Geo. Saunders & *al'*, Pasch. 5 Geo. II. *B. R.*

Evidence of Wife denied, because the Husband might receive Advantage thereby.

IN a Trial at Bar in *B. R.* upon an Issue directed out of Chancery, to find who was Heir to Sir *Thomas Coleby* deceased; *A. B.* being sworn, it was objected there, she could not be an Evidence in this Cause, because *her Husband* had already *received a Bond of* 30 l. *and was to be paid* 20 l. *more, if the Determination of that Cause went in Favour of the Party who had summoned him to give in Evidence.* The Court doubted, whether this was a sufficient Objection to destroy her Testimony; and the *Cam' Scac'* being at that Time sitting, Mr. Justice *L. being the puisne Judge*, went up

up into the Exchequer Court to ask the Opinions of the Barons in this Point of Evidence; who were all unanimous of Opinion, *that she could not be examined as a Witness;* and accordingly she was put by, and her Evidence rejected.

Petty *versus* Hutty, Pasch. 5 Geo. II. *B. R.*

Motion to quash the Writ, because not returnable at a certain Day.

A *Sci' Fa'* being brought to revive a Writ of Error upon a Judgment in the *Marshalsea* Court; Mr. *P.* Counsel, moved to quash the Writ, because it was not made returnable at a *Day certain*, and cited the Case of *Eden* versus *Wills*, *Pasch.* 12. *Geo.* 1. Sci' Fac' *to revive a Writ of Error upon a Judgment in C. B.* and the *Sci' Fac'* was quashed upon Motion; *because not returnable at a Day certain.*

(63.) To this it was answered by Mr. *M.* Counsel, that when the Proceedings are by Process upon Bill of *Middlesex*, the Writ is always made returnable upon a Day certain, and therefore the *Sci' Fac'* must pursue the original Process: and this was the Reason, that in the Case of *Eden* versus *Wills the* Sci' Fac' *was quashed;* but the Practice of Proceedings in the *Marshalsea* and other inferior Courts *is otherwise;* the Writ there is always returnable generally *at the next Court;* and the *Scire Facias* in this Case pursues the original Process, *which is sufficient.* And the Court for this Reason held the *Sci' Fac' well enough.*

The

The King *versus* Walbourne, Pasch. 5 Geo. II. *B. R.*

Motion for an Information for not repairing the Highway.

MR. *A.* Counsel, moved for an Information for not repairing the Highway; an Indictment had been brought, but the Grand Jury refused to find it; and an Affidavit being made of this Matter, and that the Way was founderous and out of Repair. *The Court made a Rule to shew Cause.*

Billingsley *versus* Trapps, Pasch. 5 Geo. II. *B. R.*

Upon a special Capias *the Defendant craved Oyer of the Original.*

UPON a *special Capias* the Defendant craved Oyer of the *Original*, which was *tested in the Vacation*, whereas the special *Capias* bore *Teste the Term preceding*; the Original is the first Process that ought to issue out, and is what warrants the Proceedings upon the *Capias*; so that it is repugnant that the *Capias* should bear *Teste precedent to the Original*, and for this Reason Mr. *S.* Counsel moved, that the Plaintiff might give *Oyer of such an Original as could warrant the Proceedings upon the Capias*, and that the Defendant might have *four Days Time to plead.*

Mr. *F.* Counsel answered, that the *Capias* was only to bring the Party into Court, and that after Appearance it was of *no further Use*, but was out of the Question; that from the Necessity

Necessity of the Thing, the *Capias* must in this Case be tested before the Original. *An Original, tho' it be taken out in the* Vacation, *yet bears teste from that Time only; but it is otherwise in a* Capias, *which only can Issue out in Term-time;* and therefore, from the Necessity of the Thing, must bear *Teste*, (when it is taken out in the Vacation,) as if it had issued the Term preceding; and cited the Case of *Andrews* and *Dingley*, *Trin.* 3 *Geo.* 2. *B. R. which was this:* The Cause of Action arose in *Vacation*, the Plaintiff took out a special *Capias*, which was tested the *preceding Term;* and upon Motion to quash this Writ, the Court adjudged the Writ to be *well enough;* otherwise the Plaintiff must have stayed till the Term following, which would be inconvenient, for the *Defendant might in the* Interim *move off.*

(64.)

The Court refused to do any Thing in the present Case; *and said, if the Plaintiff was irregular, the Defendant might take what Advantage of it he thought proper.* Vide post. *Case* 16.

Roberts *versus* Holywell, Pasch. 5 Geo. II. *B. R.*

Motion for full Costs, and allowed on special Damages laid in the Declaration.

IN an Action for *Words* the Plaintiff laid special Damages in the Declaration, *viz. Loss of Marriage; Verdict for Plaintiff*, and 20*s. Damages.*

Mr. *G.* Counsel moved that the Plaintiff might

might have her *full Costs;* for it is not the *Words, but the special Damages,* which is the *Cause of Action* in this Case; and so it is held 1 *Salk.* 206. *Browne* ver. *Gibbons, Cro. Car.* 140. *Law* ver. *Harwood.*

D. Counsel *cont':* He admitted that if the Judgment was Right, the Plaintiff must have *full Costs;* but he moved in Arrest of Judgment, that it is not any where alledged, that the Plaintiff was capable of contracting Marriage at the Time of making the *Promise;* and it appears by the Record, she was a Widow at the Time of bringing the Action; so it may be that at the Time of the *Promise she was under Coverture.* 2d Objection, That there is *no* Colloquium *of Marriage set forth;* and a Communication of Marriage cannot be intended, and therefore she does not appear to have any *Cause of Action. Cro. Car.* 322. *Brian* versus *Cockman,* 1 *Rol. Rep.* 79. *Sell* versus *Facy.* 2 *Bulst.* 276.

Cur': There is a *Colloquium* of Marriage sufficiently set out in the Declaration; *it is not necessary for the Plaintiff to alledge she was capable of Marriage; if it was otherwise, the Defendant might have proved it, and that would have been a proper Defence at the Trial;* it is said, *per quod Maritagium amisit,* which could not be, had she not been capable of Marriage; and the *Plaintiff had full Costs allowed.*

(65.)

Billingsley *versus* Trapps, 5 Geo. II.
B. R. Vide ante.

Plea. Motion to set it aside for Want of Affidavit. And so ordered by the Court, with Costs.

IN an Action upon the Case *Defendant pleaded, quod petit auditum Breve de Capias*, and then alledges, that the *Capias bore* Teste *precedent to the Original, and before the Cause of Action accrued.* Mr. *F.* Counsel moved to set aside this Plea, because there was *no Affidavit to verify it;* there is nothing of this appears upon *Record*, it is Matter of Fact only, *and there ought to have been an Affidavit.*

Per Cur': *The Plea must be set aside with Costs.*

Throgmorton *versus* Smith, 5 Geo. II.
B. R.

Ejectment.

EJectment. *The Lessor of the Plaintiff being an Infant, S.* Counsel moved that he should be *compelled by Rule of Court* to appoint a Lessee who might be *responsible for the Costs*, if the Plaintiff was nonsuited, or a Verdict found for the Defendant. The Lessor is an Infant, and cannot bind himself in *common Rule;* it is reasonable therefore he should nominate such a *Lessee as can.* In the Case of *Noke* and *Windham, Pasch.* 12 *Geo.* 1. (2 *Str.* 694) the Defendant moved for a Trial at Bar, and the Lessor of the Plaintiff, being an Infant, should appoint such a Lessee as might be liable; and the Court made a Rule accordingly. *In an Action Qui tam* the Court will stay proceedings *till it appears who is the Prosecutor;* and cited

cited a Case, wherein he moved to have Proceedings stayed till it was known who was the *Prosecutor*; and it being alledged that the Prosecutor was in *Russia*, *the Court made a Rule, that all Proceedings should be stayed till the Prosecutor returned*, unless he should find a substantial Person to give Security for Payment of Costs, if the Defendant had a Verdict.

A. Counsel *cont'*: In Ejectment an Infant may make a Lease. 2 *Leon.* 217. 3 *Keb.* 347. And if Judgment goes against the Plaintiff, a common Rule, which is always given in these Cases, will bind him.

L. Just. In the Case of *Noke* and *Windham* the Court held, that the Infant should nominate a Lessee who should be responsible; and by Consent of both Parties the Father of the Lessee was appointed. And in the principal Case the Court now made the same Rule, (66.)
viz. That the Infant should nominate a Lessee who might be responsible.

Upon the Day of shewing Cause the Infant agreed to nominate his Mother the Lessee, who entred accordingly into the common Rule to pay Costs, *&c.*

Cowell *ver.* Waller, Pasch. 5 Geo. II.

B. R. Vide post.

Motion to shew Cause why an Attachment should not go.

MR. *M.* Counsel moved to shew Cause why an *Attachment should not go against the Defendant for not obeying an Award which had been a Rule of Court.* And his Objection was, that

that there was *no Affidavit made to verify a Breach of the Award;* in the Case of the *King* and *Whiting*, the Court would not suffer the *Affirmation of a Quaker to be read in Court*, in order to ground an *Attachment upon it.* To this it was answered, there the Foundation of the Case was *Criminal, and Quakers are precluded by the Act to give Evidence in Criminal Cases.* In the Case of one *Gasper*, an Attachment was grounded upon the *Affirmation of a Quaker;* vide 7 & 8 *W.* 3. *c.* 34. Any Quaker, who shall be required on any lawful Occasion to take *an Oath*, shall, instead of the usual Form, be permitted to make his *solemn Affirmation.*

The Court *seemed* to be of this *Opinion.* But the *Rule was enlarged.*

Mainard *versus* Harvey, 5 Geo. II.

B. R. Vide post.

Scire facias to *revive a Judgment.*

SCIRE *Facias to revive a Judgment;* Defendant pleaded, that the Plaintiff had *already executed a Ca' Sa'.* This being a *sham Plea* to *prevent Execution*, the Plaintiff moved to *have Oyer of the* Ca' Sa', *and cited* a *Case in Carth.* 453. Shew Cause.

Davies *versus* Stokes, 5 Geo. II. *B. R.*

Judgment in Ejectment; Defendant brought Error.

JUdgment in Ejectment; Defendant brought Error. *F.* Counsel moved, that he might enter into *further Recognizance; an Affidavit*

Affidavit being made of the Value of the Estate, and likewise that he might find other Sureties, he himself being poor and insolvent.

Mr. *P.* Counsel: Defendant must enter into further Recognizance; but the Words of the Act are express, *that the Writ shall be allowed upon his own Security;* vide 16 & 17 *Car.* 2. § 1, 3. the Words are, *In Writs of Error to be brought upon any Judgment in Ejectment, no Execution shall be thereby stayed, unless the Plaintiff in Error be bound,* &c. and so it was adjudged *Mich.* 2 *Geo.* 1. *Barlace* versus *Baker.* And of this Opinion was the Court. But Mr. *P.* Counsel desired Time to *answer the Affidavit,* as to the Value of the Estate; and a *Rule was made accordingly.* (67.)

Moore *versus* Isles, 5 Geo. II. *B. R.*

Debt upon Bond against an Heir, who pleaded Infancy in Bar.

ACTION of Debt upon Bond against an Heir, who pleaded *Infancy in Bar,* and that the *Parol might demur.*

Mr. *B.* Counsel moved to set *aside this Plea,* because it was not *verified by Affidavit.* But the Court *denied the Motion,* and said an *Affidavit was not necessary.*

Mainard *versus* Harvey, 5 Geo. II. *B. R. Vide ante.*

Rule to shew Cause why Plaintiff should not have Oyer of a Ca' Sa'.

RULE to shew Cause why the Plaintiff should not have Oyer of a Ca' Sa', *which was pleaded in Bar to a* Sci' Fac', *&c. The Court now*

now discharged this Rule, and said, the Plaintiff might plead *Nul tiel Record;* the Case of *Theobald* versus *Long*, in *Carthew's Rep.* 453. was in *Abatement only;* when Defendant pleads in *Bar a Judgment of this Court, he must give the Plaintiff a Note of the Roll, and of the Term, &c.* but this is *never done upon a* Capias ad Satisfaciendum.

Millet *versus* Finder *& al'*, Pasch. 5 Geo. II. *B. R.*

Scire facias *against Bail.*

SCI' *Fac'* against Bail; and upon the Day that the Process was returnable, *but after the Court was up, they offered to surrender the Principal; but Plaintiff refused to receive him, and proceeded upon the* Sci' Fac'. Mr. *D.* Counsel obtained a Rule, to shew Cause why the *Sci' Fac'* should not be set aside upon Surrender of the Principal.

(68.) Mr. *S.* Counsel insisted, that regularly the Principal *ought to be surrendered upon the Return of the* Ca' Sa', *but through the Indulgence of the Court, the Bail had Time given them to bring him in at any Time before the Return of the* Scire Facias, *and had so far indulged them, that if he was brought in upon the Return-day* sedente Cur', *the Court would receive him;* but if the Principal *died before that Day*, it was at the Peril of the Bail, and they are in that Case *chargeable*. It was objected, *that the Plaintiff had not given the Bail four Days Notice;* but it was answered, that *if*

if the Sci' Fac' *lie in the Office four Days before the Return, it is sufficient to give Notice on the same Day*, and so it hath been determined upon solemn Argument.

And the Rule was discharged *per Cur'; for the Principal must be surrendered before the Court is up.*

Forrest *ver.* Bennett, Pasch. 5 Geo. II. *B. R.*

ACTION *Qui tam, &c.* Mr *W.* Counsel moved for Costs for an Irregular Countermand in a popular Action, and insisted, *that two Days was not sufficient in this Case, it being distinguished from the common Case by the Statute.* Vide 18 El. Shew Cause. Note; *The Rule was made absolute without shewing Cause.*

Motion for Costs for an irregular Countermand.

Lord Cadogan *versus* Cotes, Pasch. 5 Geo. II. *B. R.*

EJectment, upon Condition of Re-entry for Non-payment of Rent. *Judgment being now moved for against the casual Ejector, it was objected, that the late Act of Parliament requires Affidavits to be made that Rent was in Arrear.* His Lordship insisted, (being a Peer,) *an Affidavit upon Honour ought to be taken;* but afterwards submitted to make it *upon Oath, salvo*

Ejectment.

Affidavit upon Honour refused.

salvo semper Privilegio. Lord *Conningesby*'s Case was remembered, where Affidavit upon *Honour was refused by the Court in Lord Chief Justice* Prat's *Time.*

(69.) Term. Trin. 5 Geo. II. 1732. *B. R.*
The King *versus* Lowfield.

Rule to pay Costs for not going on to Trial upon an Indictment, &c.

A Rule was made for the *Defendant to pay Costs for not going on to Trial upon an Indictment*, &c. Upon shewing Cause the Case appeared to be this: *The Defendant, upon Application to the Court, obtained a Rule for a special Jury, and brought down the Record in order to proceed to Trial, but eleven of the special Jury only appeared; the Defendant had likewise obtained a Warrant from the Attorney General for a* Tales, *provided there should be* defectus Juratorum, which he produced in Court, *but did not pray a* Tales; and it was under these Circumstances that the *Costs were moved for against him.*

Mr. *F.* Counsel: There appears no Foundation for the Motion, the Defendant hath done every Thing that was Incumbent for him to do; he hath brought down the Record, and produced in Court the Warrant for a *Tales;* if the Prosecutor was willing to go to Trial, why did not he move for a *Tales? The Court never grant a* Tales ex officio, notwithstanding there is a Warrant, if there was a Necessity for a Trial, it is as incumbent upon the Prosecutor equally with the Defendant to pray

pray a *Tales;* the Warrant was produced, and he might have had the Benefit of it; but the Truth is, both Parties refused.

The Court said it was the Plaintiff's own Fault he did not proceed to Trial, and so discharged the Rule.

Doyley *versus* Daniel, Trin. 5 Geo. II. *B. R.*

Action in Assumpsit, Venue *laid in* Norfolk, *Rule to change the* Venue *to* Essex, &c.

ACTION in *Assumpsit* for Business done as an *Attorney, and the* Venue *laid in* Norfolk. A Rule was made to change the *Venue* to *Essex*. *S.* Counsel moved to discharge this Rule, and to change the *Venue* to *Middlesex* or *London, upon Affidavit that this was for Business done as Agent to an Attorney*, and that most of this Business was *performed in London* or *Middlesex*; and undertook to give material Evidence in which ever of these Places the *Venue* should be changed.

(70.)

Cur': *The proper Motion will be for the Plaintiff to amend his Declaration upon Payment of Costs, and then he may lay his* Venue *as he pleases. And a Rule was made accordingly.*

Bird *ver.* Smith, Trin. 5 Geo. II. *B. R.*

Action by Administrator discontinued, who afterwards brought a fresh Action, &c.

ACTION was brought by an Administrator, who afterwards discontinued his Action without Payment of Costs, by Leave of the Court; the

the Administrator afterwards brought a fresh Action, which was grounded upon the same Cause of Action. And now Mr. *S.* Counsel moved to *stay Proceedings in the second Action, till the Administrator had paid the Costs of the first.* If the Court will put no Restraint upon Executors and Administrators in Affairs of this Nature, it gives them a great Latitude of being vexatious; they may discontinue Action upon Action, and yet the Party is without Remedy or Redress. But the Court *refused the Motion, and said they would put no Terms upon Executors or Administrators; if they are nonsuited, or a Verdict goes against them, they pay no Costs.*

Cowell *ver.* Waller, Trin. 5 Geo. II.

B. R. Vide ante.

Award. Motion to shew Cause why an Attachment should not go against the Defendant for not performing an Award.

M. Counsel moved to shew Cause why an Attachment should not go against the Defendant for not performing an Award which had been made a Rule of Court. The Parties entered into Bonds of Arbitration to submit all Controversies to Arbitrators, who had Time given them till the 17*th of January* to make an Award, and if they could not agree to determine Matters by that Time, then a Power to chuse an Umpire, who was to make his *Umpirage* on or before *the* 21 *Febr.* On *the* 14 *Jan.* which was before the Determination of the Power of Arbitration by Process of Time, they chose an Umpire, who likewise

wise made his Umpirage *before the* 17 *Jan.* which was the Time limited for the Arbitrators to make the *Award in.* The chief Objection to the Award it self was, that altho' the Arbitrators might chuse an Umpire before 17*th of January*, yet that Umpire could not make an Umpirage before that Time; *because the Chusing the Umpire did not absolutely determine their Authority, but they had still a Power left in them to make an Award*; so that here are two concurring Jurisdictions existing at the same Time, which is absurd; and it was adjudged in 1 *Levinz* 302. *Donavan* versus *Mascall*, and in *Raym.* 205. that the Umpirage is in this Case void; for tho' the Arbitrators may chuse an Umpire at any Time during the Continuance of their Power, yet the Umpire cannot act till the Arbitrator's Time is expired; he likewise cited *the Case of* Reynolds *versus* Gray, 1 *Salk.* 70. where it is held by *Holt* C. J. that if the Arbitrators chuse an Umpire before the Time allowed for their Award be expired, it is *ipso facto* void, tho' they absolutely resolve to make no Award themselves. (71.)

Counsel on the same Side objected, that an Attachment ought not to go; because it does not appear *by Affidavit when the Umpirage was executed*; it is only alledged he made an Umpirage *on such a Day*, and that the same was signed, sealed and delivered, but it does not *appear when*; *so that it is probable that it might be executed after the Time limited by the Submission, and antedated to bring it within the Time, and make the Award good*; and therefore in

in the Case of an Attachment it is necessary to *verify by Affidavit, that the Award was made within the Time, and executed likewise; and of this Opinion was the whole Court.* But as to the Validity of the Umpirage it self,

Raymond C. J. said, he thought that it was well enough; for altho' the Arbitrators did chuse an Umpire, who likewise made an Umpirage before the Time allowed for the Award was expired, *yet he held the Umpirage good*, because the *Arbitrators had determined their Power by chusing an Umpire*; and so is *Mitchell* and *Harris*'s Case, 1 *Salk.* 71. *Tho. Jones* 167. 1 *Roll. Abr.* 262. Here are in this Case two distinct Powers given to the Arbitrators, *viz.* either to make an Award on or before the 17*th of January*, or to chuse an Umpire; and therefore, when the Arbitrators have once chosen an Umpire, that is an Execution of their Power, and determines their Authority; and of this Opinion were *Page* and *Probyn* Justices; but they gave no absolute Opinion in this Point, because the *Rule was discharged for the Defect in the Affidavit.*

Perry *versus* Perry, Trin. 5 Geo. II. *B. R.*

Action for Words. Special Damages laid.

ACTION for *Words* which were in *themselves actionable*, and *special Damages laid in the Declaration*; upon Not guilty pleaded, and Verdict for the Plaintiff, and 5 *s. Damages*, Mr. Serjeant *B.* moved for Costs *de incremento*,

incremento, because special Damages are laid in the Declaration, and so the Statute does not extend to this Case. *In the Case of Phillip* versus *Smith*, *Trin.* 11 *Geo.* 1. Action was brought against Defendant for speaking scandalous Words of the Plaintiff, and charging him and others with stealing his Cocks and Hens, and *special Damages were likewise laid in the Declaration*; a Verdict was found for the Plaintiff, and notwithstanding the Damages were under 40 *s.* yet the Court *awarded Costs* de incremento. (72.)

Cur': The Words, as they are laid in the Declaration in this Case are in themselves actionable, and the special *Damages are only Matter of Aggravation.* It is alledged in this Case, that the Defendant spoke such and such Words, *per quod the Plaintiff lost his Customers*; the special Damages, as they are here alledged, *are not actionable*; *for an Action will not lie for losing a Man his Custom*; and therefore the Damages must be given in the Case upon the *Words themselves.* In the Case of *Phillips* and *Smith* there were two distinct Causes of Action, and the special Damages were as *well actionable as the Words*, and that was the Reason that *full Costs were given in that Case.* Vide 1 *Salk.* 206. *Brown* and *Gibbons.* Action for slanderous Words spoken by his Wife, *viz.* that she was a Whore, *per quod* he lost such and such Customers; Verdict for the Plaintiff, and Damages under 40 *s.* and the Question was, whether the Plaintiff could have full Costs, notwithstanding 21 *Jac.* 1. *c.* 16. *Et per Cur'*: The Plaintiff shall have his full

full Costs; *for it is not the Words but the special Damages which is the Cause of Action; so held Cro. Car.* 140. *Law* and *Harwood, Pasch.* 5 *Geo.* 2. *Roberts* versus *Holywell, quod videas ante.*

Hutchins *versus* Molting, Trin. 5 Geo. II. *B. R.*

Action of false Imprisonment; Defendant prayed Leave to plead double.

AN Action of false Imprisonment. Defendant prayed Leave to plead double, *viz. Not guilty; and a Warrant under the Hand and Seal of a Justice of Peace* in *America*, who committed him for a Misdemeanor. It was objected, that these Pleas were *contradictory*; but the Court over-ruled the Objection; and said, in *Replevin the Defendant may plead in Avowry and* Non Capit; *and so granted the Motion.*

(73.)

Hoare *versus* Gates, Trin. 5 Geo. II. *B. R. Vide postea*, Hill. 7 Geo. II.

Non assumpsit *pleaded*, &c.

A*Ssumpsit.* Defendant pleaded *non Assumpsit*, and *non Assumpsit infra sex annos.* Plaintiff replies, that in such a Term he took out a Bill of *Middlesex*, and then avers, *quod causa actionis accrevit infra sex annos ante prosecutionem Billæ prædict'.* The Defendant rejoins, and says, that the Bill of *Middlesex* was taken out *post clausum Termini*; and altho' Bills that issue out

out in the Vacation are entred as of the Term preceding, yet *in rei veritate* the Bill of *Middlesex* issued out *post clausum Termini*, *viz.* on such a Day, and concludes *quod causa actionis non accrevit, &c.* To this the Plaintiff demurred; and on Demurrer the single Question was, whether this is a good Averment.

Mr. *D.* Counsel insisted, that the Party is estopped to aver, that the Bill of *Middlesex* issued at any other Time than that on which it was entred; and cited 1 *Lutw.* 333, 334. *Aldworth* versus *Hutchinson.* 1 *Sid.* 271. *Baily* versus *Bunning.* A *Fi' Fa'* was sued out *Teste* 4 *Junii*; 6 *Junii* he to whom the Goods belonged became a Bankrupt, and the Jury moreover found, that the said Writ of *Fi' Fa'* was made out the 11 *Junii*, and executed the 14th. All this Matter being returned upon a special Order, the Question was, whether the Goods were liable to the Execution from the *Teste*, or from the Time that the *Fi' Fa'* was actually sued out; and the Court was of Opinion, that the Goods were liable from the Time of the *Teste* of the *Fi' Fa'*; and that from thence it shall be said *emanatio Brevis*, and altho' in Fact it did issue at another Time.

Mr. *D.* Counsel *cont':* There is a Difference between a Bill of *Middlesex* or *Latitat*, and any other Writ, for that a Bill of *Middlesex or Latitat may be sued out before the Cause of Action*; and it hath been so held not only upon *Motion*, but upon *special Demurrer. Cro. Eliz.* 561. and such an Averment is not inconsistent with the Course of Proceedings. *Cro. Eliz.*

Eliz. 264. 1 *Rol. Abr.* 538. 2 *Keb.* 173, 198. 3 *Keb.* 212. *What is done* in Vacation is *supposed to be done in the preceding Term.* But the Question is, whether the Supposition is so strong that it will admit of no Averment to the contrary. The Court gave no Judgment, but adjourned it to a second Argument.

(74.) *In the Common Pleas.*

Kemish *versus* Betson, Trin. 5 Geo. II.

Mutual Debts in Evidence must be of the same Degree, &c.

R*Esolved* per totam Cur' : *Where the Party will take the Benefit of* 2 Geo. 2. c. 22. *by pleading in Bar, or giving mutual Debts in Evidence,* &c. *they must be Debts of the same Nature and Degree, otherwise in the Case of an Executor it might work a* Devastavit.

Traverse *ver.* Wood, Trin. 5 Geo. II.
B. R.

Error.

W*HERE a Writ of Error is brought, and Rule is made to assign Errors, if Notice is hung up in the Office, and Plaintiff in Error does not assign Error, Defendant may come and pray a second Rule, and if the Plaintiff does not then assign Error, he shall be nonpross'd; and so it was agreed upon Mr.* W.'*s Motion, which was upon a Writ of Error out of* Ireland, *an Affidavit being made that the Defendant did not know*

know who was Attorney in the Cause, and that the first Rule was hung up in the Office, unless the Plaintiff assign Error in a Week's Time.

Twisleton *ver.* Duell, Trin. 5 Geo. II. *B. R.*

Rule to quash a Scire facias *because there was not fifteen Days between the* Teste *and Return.*

RULE *to quash a* Scire Facias, *because there were not fifteen Days between the* Teste *and Return.* Mr. *A.* Counsel moved to discharge the Rule, and relied upon the 16 *Car.* 1. *c.* 6. §. 1, 7. that the Return is aided by the Statute, which expresly provides, *that the Return shall be good notwithstanding there be not fifteen Days between the* Quarto die *and the Return.* And Mr. *T.* and Mr. *D.* Counsel said, that so it was objected in two Cases in which they were Counsel; and therefore the Court discharged the Rule.

Raymond C. J. *took Notice, that there was a Mistake in the Act, and that the Return-day, which is there called* Crastino Ascensionis Dom', *should have been* Crastino Trinitatis.

Talland *ver.* Warren, Trin. 5 Geo. II. (75.) *B. R.*

Action of Debt; Defendant pleads Payment.

ACTION of Debt upon Bond payable 11 *June.* Defendant pleads Payment upon the 10th, upon which Issue was joined, and Verdict for the Plaintiff.

H. Counsel moved in Arrest of Judgment, that this was a bad Issue notwithstanding it was found for the Plaintiff, *for it may be true, that he did not pay it on the* 10*th*, *and yet the Money might be paid upon the* 11*th*. Vide *Cro. Jac.* 434. *Holms* and *Broket*.

R. Counsel *cont'*: The Issue is, that the Money was paid *ante diem exhibitionis Billæ*, *scil.* on the 11th of *June*, if the *scil.* be rejected the Issue is good after Verdict; and of this Opinion was the Court, being aided by the Statute 4 & 5 *Anne*, *c.* 16. which enacts, *that Payment* ante diem *shall be deemed Payment* ad diem.

Oldham *versus* Lack, Trin. 5 Geo. II. *B. R.*

Assault and Battery. Defendant pleaded he lived in the County Palatine of Chester.

ACTION of Assault and Battery. Defendant pleaded, that he lived in the County Palatine of *Chester*, which he pleaded to the Jurisdiction of this Court; and it was now moved to set aside this Plea for Want of *an Affidavit to verify*, &c. It appeared only to be the Mistake of the Attorney's Clerk, who had an Affidavit but did not annex it to the Plea; and Mr. *P.* Counsel insisted, that a *subsequent Affidavit might supply this Defect*; *and cited the Case of Solennes* versus *Duvan*, *Mich.* 1 *Geo.* 2. Action against a Woman who pleaded *Coverture*; Plaintiff moved to set aside this Plea for *Want of an Affidavit*; Defendant came afterwards and produced an *Affidavit*,

Affidavit, that in a Letter of Attorney then in the Hands of the Plaintiff's Attorney, one *B.* was mentioned as Husband to the Defendant; and this Affidavit was allowed, and the Plea held good; but the Reason was, because it appeared from the Plaintiff's own Confession, that the Defendant was under Coverture, and so no Occasion for Defendant to verify it by Affidavit; *but otherwise an Affidavit had been necessary, and so it is in the present Case; and therefore the Plea was set aside.*

The King *versus* Franklin, Term. Hill. 5 Geo. II. 1731. *B. R. Vide post.* (76.)

FRanklin *was convicted upon an Information for publishing a Libel against the Government; and now* Mr. *B.* Counsel moved that the *Prosecutor should bring in the* Postea, *and that the Jury Process*, &c. *might be filed*; and said such a Motion was granted in the *King* and *Ward*, and also in the Case of the *King* and *Wright*.

Information for publishing a Libel.

It was objected by the Court, upon the Information of Mr. *M.* that this was contrary to the Practice of the Court in these Cases, to hasten and oblige the Crown to bring in the *Postea* upon Motion; and that the *Defendant could not move in Arrest of Judgment till the Prosecutor had brought in the* Postea *and given a Rule*, &c. *to the Defendant.*

Mr. *B.* Counsel: There seems to me no Reason for such a Practice: In all Cases relating to the Revenue, Assise, *&c.* when the Crown is Prosecutor the Defendant upon Motion hath a Rule of Course to bring in the *Postea*; the same Reason in this Case, and stronger, *for should the Prosecutor refuse to bring in the* Postea, *which perhaps may never be brought in at all, and so the Party be without Remedy.* Rule *per Cur', nisi.*

At another Day Mr. Attorney General came and *shewed Cause*; and alledged, that this Motion was contrary to Practice; that there never was one Instance that the *Postea* was ever filed in these Cases, but that it always remained in the Hands of the *Clerk in Court*: and that when it is brought into Court *the* Distringas *is always annexed to it*, and brought in along with it. The Defendant, if he pleases, may move to have the *Postea* brought in, which is the common Motion in these Cases in order to move in Arrest of Judgment. It is impossible the *Distringas* should be filed, there being no File for that *Purpose in the Crown-Office*; it is always annexed to the *Postea, and cannot be separated from it upon Motion.* As to the *Venire* he said, that was filed before the Motion was made, and if the Defendant had any Objection to that, it was open to his Inspection.

Mr. *B.* and Mr. *F.* Counsel *cont': If the* Postea *and* Distringas *are brought into Court it will answer our Purpose.* Altho' the *Distringas* is annexed to the *Postea* upon the Return, and
(77.) is brought into Court along with it, yet it is always

always sent back again to be filed; *for it is no Part of the Record*, nor is it entred upon the Plea.

Cur': The *Distringas* cannot be filed, *there is no File in the Office for that Purpose*; the Defendant after Conviction may come at any Time *within the four first Days of the Term*, and upon Motion oblige the Clerk in Court to attend and bring in the *Postea*, he is intitled to it *de jure*; and this is the constant Practice in these Cases; and so made a Rule, that the *Postea* and *Distringas* should be brought into Court, and the *Venire* filed.

King *versus* Franklin, Hill. 5 Geo. II.

B. R. Vide ante.

F*Ranklin* being convicted upon an Information for Publishing a Libel, his Counsel *moved to set aside the Verdict, the Trial being by a Jury who had no Authority; and objected, that a Rule being made in* B. R. *for a special Jury for the Trial*, &c. *the Sittings after* Trinity *Term expresly, and he, being then not tried, could not afterwards be tried by the same Rule the Sittings after* Michaelmas *Term, but that a new Rule should have been made by the Court*, &c. and compared it to the Case of *Layer*, who, upon Motion to the Court to appoint a Day for Execution, a Rule was obtained, but at the Day of Execution was suspended by his Majesty. The subsequent Term new Application was made to the Court, and a second Day appointed, but his Majesty was then pleased

pleased to grant a further Reprieve, which occasioned a fresh Application, *&c.* The same Reason for a new Rule in this Case; for the old Rule being special, and restrained to a particular Time by express Words, *viz. At the Sittings after* Trinity *Term*, the Rule must expire with the Time, and therefore necessary to have a fresh Rule. It was further argued that this is the constant Practice in the *Common Pleas*, and that new Rules are always granted in Cases of this Nature; but what was chiefly relied upon was the Statute of 3 *Geo.* 2 for Regulation of Juries, which now inforced the Practice, and made it absolutely necessary to have a fresh Rule. *Vide* the Statute.

To these objections the King's Counsel made three Answers.

1*st*, *That the Objection was made out of Time*; 2dly, *Before the late Act of Parliament there would have been no Weight in the Objection*; *and* 3dly, *the late Act of Parliament does not extend to the Crown, and so the Crown is not bound or precluded by it.* As to the 1*st* it was insisted, that the Defendant was now too late
(78.) to make any Challenge to the Array, for after a Challenge to the Poll, the Party is precluded to his Challenge of the Array; and so it is held in 1 *Inst.* 158. and laid down there as a Maxim, that after Challenge to the Poll, there can be no Challenge to the Array; there is no Precedent to Impeach this Maxim; the Defendant in this Case falls within this Rule; he made his Challenge to Poll; and Captain *Wingfield* was struck off the Panel, and a *Tales* sworn

sworn in his Place; and so the Defendant is now too late to make Objections to the Array: Suppose a Rule is made for a special Jury, and the Parties proceed to Trial before a common Jury, the Verdict afterwards shall not be impeached; for the Defendant must either make Challenge to the Array, or let Judgment go by Default; but if he appears, and a Defence is made, he is by that precluded to make any Objection to the Jury afterwards; and so it was adjudged 13 *W.* 3. *Anonymus* Case, *in an Action for Words.*

2*dly*, It was said, that before the late Act of Parliament this Objection could be of no Weight; for before that Act the Authority of special Juries did not arise from the Rule of Court; for the Purpose of the Rule is only to have a fair Jury; and after that is once struck, the Rule hath had its Effect, and then the Authority of the Jury arises from the King's Writ; for a Jury cannot be returned upon a Rule of Court, but upon the *Distringas* and *Venire* issuing to the Sheriff for that Purpose; that Part of the Rule, which limits the Trial to a particular Time, can be of no Force; for after the Parties have been before the Master, and a fair and impartial Jury is struck, that Jury is under the same circumstances, and their Authority of the same Nature with all common Juries: Suppose this Rule had been limited to the first Sittings in Term, if the Cause be not then brought to Trial, would there be Occasion for a new Rule to try it at the second Sittings? it would be absurd to imagine it? the same Reason when the Rule

is

is for Trial after Term. In these Cases a new Jury is never struck, nor does a new *Venire* issue for that Purpose, *Alias Distringas* issues out; and the Continuance is entered upon that; so the Trial is upon the old *Venire*, and by the old Jury; *pari ratione*, when a Rule is made for a special Jury, and a Jury is struck accordingly, tho' the Trial be not precisely at the Time limited by the Rule, yet the Authority of the Jury is continued upon the *Alias Distringas*; and yet there is the same Reason for a new Jury as for a new Rule. It is impossible to have a *Venire de novo* in this Case; for the Statute 7 & 8 *W.* 3. *which gives the new* Venire, *does not extend to the Crown*; *and it is adjudged in* 2 Vent. 173. *that a new* Venire *is Error*; *a fortiori* if there (79.) cannot be a *Venire de novo*, there cannot be a Rule *de novo*; for the Court cannot make a Rule to have that particular Jury returned; for that would be in Effect for the Court to strike the Jury; and tho' it is said to be the Practice of the Common Pleas, yet the Practice of our Court is not the Practice of another. But admitting this to be the Practice of the Common Pleas, yet the King is not included within that Practice, for it extends only to Civil Cases. And when the general Words of an Act of Parliament do not extend to the Crown, the general Practice of a Court shall not? There are no negative Words in this Rule; and tho' the Time is strictly limited to the Sittings after Term, yet it cannot negatively be inferred from thence, that a Trial subsequent to that Time will be erroneous; and

and when no Inconvenience can arise to the Party by extending the old Rule to a further Day, there can be no Necessity for any fresh Application to the Court for a new one. In all Cases upon Trials at Bar, where a Time certain is limited for the Trial, if at the Day there is a *Defectus Juratorem*, upon which the Trial is adjourned; yet there is never Application made to the Court for a new Trial at Bar *de novo*, but a *Decem Tales* is awarded, and the Trial is had upon the old Rule: and yet in that Case the Jury is struck in the same Manner as it is here, and so falls within the same Reason. As to *Layer's* Case, where Rules *de novo* are granted for Execution, that Case makes nothing for them; *for there the Sheriff's Authority arises altogether from the Rule, and consequently expires with it*; but in this Case the Authority of the Jury takes its foundation from the King's Writ; and so long as the Writ continues in force, so long the Authority of the Jury remains. There would therefore have been no Weight in this Objection before the 3 *Geo.* 2. and what Alteration that will make in the present Case is proper for the Consideration of the Court; which falls under the third Answer, *viz.* that the Act of Parliament does not extend to the Crown, and so the Crown is not bound or precluded by it.

All Acts of Parliament that are made for the Ease of Juries, and that prescribe particular Methods for the Form of Proceeding to be observed between Plaintiff and Defendant, *unless there are particular Words to extend those Acts*

Acts to the Crown, the Crown is not included within the general Words; which is the Reason that the *Stat.* 7 & 8 *W.* 3. gives a new *Venire*, does not extend to the Prosecutor when the Crown is concerned; and yet it is expresly enacted by that Statute, that if any Plaintiff or Demandant in any Cause depending in any of the Courts at *Westminster*, which shall be at Issue, shall bring or sue forth any *Venire facias, &c.* in order to the Trial of such
(80.) Issue at the Assises, and shall then proceed to Trial, that the Plaintiff or Demandant, whenever he shall think fit to try the said Issue, shall sue forth a *Venire de novo*; here the Words are as express as possible; any Plaintiff or Demandant cannot; yet because there are no particular Words to extend it to the Crown, no *Venire de novo* does ever issue at the suit of the Crown. By 29 *Car.* 2. *c.* 3. *Writs of Execution shall not bind the Property of the Goods, but from the Time the Writ is delivered to the Sheriff*; but in Execution *at the suit of the Crown, their Property is always bound from the* Teste *of the Writ.* In the Statute of Jeofails, Revenue Causes are expresly mentioned, otherwise the Crown had not been included within those Acts; the Statute 35 *H.* 8. *c.* 6. *which gives a Tales de Circumstantibus*, does not extend to Juries impanelled to try Causes between the King and Party; and therefore by the 4 & 5 *P. & M. c.* 7. *the Crown is expresly mentioned.* In the Case of the *King* and *Meredith*, *Trin.* 13 *W.* 3. upon an Information for Perjury, a *Venire facias* issued forth returnable *Tres Trin.* the then Attorney General died, and Sir *Edward*

ward Northey succeeded him; the Cause did not come on to Trial, but Continuances were entered upon the *Distringas* for a Year; after Verdict it was objected, that no Continuances were entered upon the *Venire*; and yet the Court adjudged that Jury to be a sufficient Jury. In the Exchequer there never issues a *Venire*; and the Reason of this Practice is obvious, for the *Stat.* 7 & 8 *W.* 3. (which gives the new *Venire*,) does not extend to the Crown; the Act of 3 *Geo.* 2. is within the same Reason as these Cases. There are no particular Words to extend it to the Crown; and it is impossible, from the Necessity of the Thing, that the Crown should be included by it; for unless the Crown should have a new *Venire*, as hath been observed, they cannot have a new Rule; and the Crown cannot have a new *Venire*, because the Statute which gives the new *Venire* does not extend to the Crown; *ergo*, &c. But admitting the Crown to be included within the late Act, if it can have any Effect in the present Case, it will be in Favour of the Crown; for by the express Words of the Act, when a special Jury is once struck and returned, the Cause must be tried by that Jury; the Words are, *Which first Jury so struck as aforesaid shall be the Jury returned for the Trial of the said Issue*; admitting therefore this Act to have any Weight in the present Question, there could not have been a new *Venire*; the Cause must have been tried by the same Jury which was first struck and returned upon the old Rule.

To these Answers the Defendant's Counsel replied,

replied, That it was not too late to make the
(81.) Objections. *In* Gardiner's *Case*, 5 Rep. 37. *and in* Cro. Car. 278. *a Defence was made*, and yet Objections were taken to the *Verdict*, *the one in Arrest of Judgment*, *and the other in Error*; and the Objection to both the Cases were to the *Panel of the Jury*; *in* Gardiner's *Case twenty-three Jurors* were only returned, of which twelve appeared and gave Verdict; and tho' it was adjudged, that this was remedied by 18 *Eliz. c.* 14. yet if it had not been for that Statute, Judgment would have been Arrested; in the other Case of *Fines* and *Norton*, in *Cro. Car.* 278. twenty-three Jurors only were returned upon the *Venire*, and in the *Habeas Corpora* there were twenty-four, the last of which *viz. W. L.* was not returned upon the *Venire*, the whole twenty-four being returned by *Distringas*, twelve of them were sworn, whereof the said *W. L.* was one; and after Verdict this was held to be a *manifest Error*. The Objection in the present Case is to the Panel of the Jurors, *there ought to have been forty-eight returned*, whereas *twenty-four have only been returned*; which is as manifest an *Error in special Juries*, as where twenty-three only were returned upon common Juries; *so if a bad Return be made to the* Venire, *a Writ of Error will lie after Verdict*. 1 *Rol. Abr.* 800. It would be putting a Difficulty upon the Defendant, to oblige him to make his Objection *eo instanti*; where a Doubt arises, he ought to have Time to consider of it, to enable him to lay it properly before the Court. This Objection arises properly upon the

the Rule of Court, which is the best Judge of its own Proceedings; it is not so much a Challenge to the Jury, as to the Proceedings of the Sheriff upon that Rule; and whether he acted according to the Directions of the Court is proper for the Consideration of the Court. The *Anonymus* Case, cited by the other Side, was upon a good Jury, there is no Distinction between a good Jury and a common Jury: Supposing no Defence had been made in that Case, could the Defendant have objected that the Jury was not a good Jury? the Sheriff is a proper Judge what is a good Jury; and that when he hath returned a fair Jury, be there a Defence or no Defence, it is the same Thing; a Verdict was never set aside because the Jury was not a good Jury. If the Plaintiff should move for a special Jury, he may wave his Motion, and try his Cause by a common Jury. Had the Verdict in this Case been by a common Jury, *viz. by a Jury chosen by Balloting according to the late Act*, the Conviction had been good; but in this Case the Authority of the Jury depends upon the Rule of Court; and altho' the Authority of Juries in general depends upon the King's Writ, yet the particular Manner of returning twenty-four depends upon the Rule of Court; and when the Rule falls, the Authority of the Jury is determined *The Act of Parliament* (82.) *expresly prescribes that forty-eight shall* be returned, *but special Juries struck by Rule of Court are excepted out of the Act*, so that these Juries have their Authority from the Rule of Court; but it is insisted on, that if the Act extends

extends to the Crown, it is in this Case to be taken in Favour of the Crown; for it is said, the same Jury must be struck and returned to try the same Cause. The Act in this Case hath been complied with *ex omni*; a Jury hath been struck, and the same Jury returned, so the Intention of the Act hath been fulfilled in this Particular; and there is no Proviso made in the Act, that if the Trial should go off the same Jury shall subsist; the Intention of the Act is otherwise, and made to prevent Mischiefs arising from the Continuation of Juries; but should the Doctrine of the other Side prevail, the whole Force and Energy of the Act will be over-turned; *the Act recites several Abuses in the Impanelling and returning Juries.* Vide 3 *Geo.* 2. *and for preventing of such Abuses, directs and prescribes the Balloting, to prevent Fraud in soliciting Juries, to prevent Mischiefs arising from the picking up Talesmen.* There are likewise Words that import there must be fresh Juries; the Act likewise inforces an Attendance, by giving Power to the Judge, *&c. it likewise provides that Jurors shall have Certificates of their Discharge from serving for two Years.* But if this Construction prevails, the Act will have no Effect as to these Particulars; will not Juries continue as they did before the Act? will they not be as liable to be tampered with and solicited? *Supposing a Design to have a packed Jury, the Method will be this; the Plaintiff will get a Rule for a special Jury, will have a Jury struck, will have twenty-four returned, and those he will continue upon the* Distringas *till he hath Time and Opportunity to mould*

mould them to his Purpose. But admitting the Jury cannot be corrupted, the Plaintiff may continue them till one dies, and by this Means Talesmen will be added as before. By the same Reasons that this Construction prevails in Criminal Cases, it will prevail in Civil Cases; and so the essential End of the Act will be intirely over-turned. It is further insisted upon, that there could be no new Rule in this Case from the Necessity of the Thing, because the Crown cannot sue out a new *Venire, &c.* wherever a new Law is introduced, the Practice of the Court must conform to the Intention of that Law, and not the Intention of that Law to the Forms of the Court: Where a Rule cannot subsist by Reason of a new Law, but it is necessary *ut res valeat* to have a new Rule, in that Case a *Venire* must issue of Course. *Bro. Ven. fac. pl.* 30. and tho' the Matter does not appear upon Record to intitle them to a new *Venire*, yet it may be suggested upon Record; for if the Party can have Liberty, for the Sake of making Continuances, to suggest what is contrary to Matter of Fact, *a fortiori* where it is in Support of an Act of Parliament, which cannot subsist without such Suggestion. Supposing a *Venire* issue upon the Balloting Clause, will that preclude the Party to apply to the Court for a special Jury? this would be carrying the Act apparently further than was intended; for Trials by special Juries are in this Respect excepted out of the Act. The Statute for this Reason gives a general Direction, and takes no Notice whether a *Venire* issued before or no; for the Issue is the Thing the

(83.)

the Act hath in View, and takes no Notice of the Process. Supposing before the Act a *Venire* was taken out, must Proceedings be upon that *Venire?* certainly no; therefore a new *Venire* may issue forth by Virtue of this Act; and tho' the Words of the Act are general, yet such Construction must be made as is consistent with the Meaning of the Act; in some Cases Continuances may be entred upon the *Venire*, as where the Array is quashed; nothing more certain, than that a new *Venire* issues of Course. *Bro. Ven. fac. Stanf. P. C.* 155. *b. Keikwey* 56. *b.* 5 *Rep.* 41. *b. Rowland's* Case. *Venire may be quashed at the Suit of the Party. Aleyn* 18. In the Case of *Wright* and *Pindar*, an *Alias Venire* was awarded. In this Case, had there been a new *Venire*, the Intention of the Act would have been answered. The *Venire* ought to have been returned and filed, to convince the Court the Crown could not have another *Venire*; by the Continuance upon the *Venire* of *Vicecomes non misit Breve*, the Crown may have as many *Venires* as they please. Suppose there had been no *Venire* at all, would a Defence have aided the Error? In the Case of *Young* and *Watson*, *Cro. Eliz.* 308, there was no Return to the *Venire*, and yet that was held Error after Verdict; the Court might have granted a new Rule after the old one was expired, and a *Venire de novo* would have issued in that Case. 2 *Rol. Abr.* 720. *pl.* 2. If at the Return of the Inquest upon a *Venire*, a Writ comes from the King not to proceed, *Rege inconsulto*, and afterwards a *Procedendo* is granted, a new *Venire* issues and not a *Habeas Corpora*;

Corpora; and so is 2 *Rol. Abr.* 721. *pl.* 7. in the Case of *Wilby* and *Quinsey*, *Hob.* 130. the *Habeas Corpora* was returned *album Breve*, and thereupon a new *Venire* was awarded. Note; *In the Case of* Greene *and* Cole, 2 *Saund.* 257, 258. *Error was assigned upon this Misreturn of the* Venire; *and it was objected, that the Defendant might have challenged the Array, but that it was the erroneous Act of the Court to Misaward the* Venire. As to Trials at *Bar, where the Cause does not come on to Trial at the Day appointed, it is put off by Adjournment; and when the Trial comes on, the* (84.) *Entry upon the Record is made upon that Day which was first appointed*; and in all these Cases the *Adjournment is to a Day within the same Term; there is no Instance of Trials being adjourned to a subsequent Term, without fresh Application to the Court to obtain a new Rule.* In Trials at Bar, if at the Day appointed there is *Defectus Juratorum*, a *Decem Tales* or an *Octo Tales* issues, which is a Continuation of the same Process, and so a great Difference between Trials at Bar by Adjournment, and Trials by special Juries.

Raymond C. J. delivered the Opinion of the Court; *That there did not appear any Irregularity upon the Record to set aside the Verdict*; he said the Act of Parliament was a beneficial Act, and ought to be supported; he then mentioned the Mischiefs which occasioned the making that Act, and the several Remedies that are applied in the Redress of them. *Vide* 3 *Geo.* 2. *An Act for the better Regulation of Juries.* The Act particularly prescribes,

that no Jurors shall be returned which have served within such a Time, *i. e.* (*Two Years*); it further provides, that no less than *forty-eight* shall be returned upon the *Venire*, unless in particular Cases, where, upon Application to the Court, a Rule is granted for a special Jury; *so that by the express Words of the Statute special Juries are excepted; the Method therefore of proceeding by special Juries is in no wise altered, but must be in the same Form, and in the same Manner, as before the Act*; the Statute indeed goes further, and says, *after a special Jury is struck, the Jury so struck shall be the Persons returned for the Trial*; but there are no additional Words to make it necessary for the same Jury to serve; for if these words had been inserted, they would have excluded Talesmen, which would have been inconvenient in these Cases; *the Case in Question is not included within the Words of the Act*; and the Court cannot extend the Words of the Act to it; neither will the Intention or Force of the Act be any Ways impeached or offended by this Construction; it is insisted upon by the Defendant, that the Rule was specially confined to a Time, *viz.* to the Sittings after *Trinity* Term, and that in these Cases it is the Rule of the Court which gives the Authority to the Jury. *The Court is of another Opinion, that in all these Cases the Authority of a Jury arises from the King's Writ*; the Import of the Rule is to have a *fair Jury struck before the Master*, and after that is done the Return must be made by the Sheriff, as in other Cases, who returns the *Venire*, upon which the Power of

of the Jury depends; and tho' the Rule is to have the Trial at a Time limited, yet it is not *restrictive*; the Rule is *pro triatione* in general, and the Time limited shews only the Intention of the Court to have it tried at that Time, but it is not to be taken *negatively*, *at that Time and no other*; in this Case the Crown could not have a *Venire de novo*; and therefore from the Necessity of the Thing the Trial must be upon the old Rule. Before 7 & 8 *W.* 3. a new *Venire* could issue in some Cases, as upon a Challenge to the Array; so where the Verdict is imperfect, when there hath been a Misreturn of the Jurors, *&c.* in these Cases, and the like, a *Venire de novo* would issue. In *Aleyn* 18. it is said, an *Alias Venire* should be awarded, and not a *Venire de novo*; but he thought that an odd Case, and said he never before heard of an *Alias Venire*. In *Styles* 22, 34. it is held a *Venire de novo* would go; but even in that Case there are contradictory Opinions; and tho' it was adjudged a *Venire de novo* should be awarded, yet it was held, that the same Jury should be returned. This Case hath a great Resemblance to the Case in *Stiles*, the same Jury is returned in this Case, only the Continuances are kept on upon the *Distringas*, and an *Alias Distringas* is awarded, in all the Cases cited by the Defendant there hath been the same *Mistake either in impanelling the Jury, or returning the Writ*; but when there appears no Defect upon Record, a new *Venire* never goes; 7 & 8 Will. 3. *does not extend to Criminal Cases, so that Cases of that Nature remain as* (85.)

they were before the Act; before this Act *Venire's de novo* have been granted, but never without the Consent of the Parties. It is said, that in *C. B.* in Cases of special Juries new Rules are always granted; admitting it to be so, it avails nothing here, for different Courts have different Forms, and their Practice varies in many Circumstances. *When an Irregularity is complained of, the Party complaining must shew the Irregularity, and not put the other Party to vindicate his Proceedings, and shew that he is regular*; there does not appear to be any Irregularity in the present Case; but the Court is unanimous, *that the Verdict shall stand. Whether or no the Defendant was too late to make his objection, he said, the Court would not determine, the Objection being over-ruled upon the Merits of it; but without Doubt in Cases of Irregularity Advantage must be taken of it in proper Season; otherwise no Advantage can be taken of it afterwards.*

Mr. B. *Counsel moved the Court, that the Defendant having given sufficient Security might not be committed before Judgment should be given.*

The A. G. *opposed the Motion, and said, there had been Instances where immediately after Verdict at* Nisi prius, *the Defendant had been committed, and so insisted upon his Commitment.*

(86.) *Mr.* B. *then moved in Arrest of Judgment*, and desired a Day's Time to consider of it.

The *A. G. refused to consent*; *and said, that when the Defendant was called to receive Judgment, then his Counsel might move in Arrest of Judgment*; and so prayed the Defendant might

might be committed, and brought up to receive Judgment on the Day following.

The King *versus* Franklin, Hil. 5 Geo. II. *B. R. Vide ante.*

Judgment being prayed against the Defendant, it was moved in Arrest of Judgment, that the Rule which was granted by the Court for returning a special Jury, and by Virtue of which a special Jury was returned, should have been suggested on Record. That this was an Objection arising upon the Record of *Nisi prius*; and tho' this Case is by a particular Exception taken out of the Balloting Clause, yet the Rule itself flows from the Authority of the Act; and therefore should have been taken Notice of upon Record, to shew that the Proceedings in this Case were not grounded upon the Rules of Common Law, nor yet according to the general Provision of the late Act upon the Balloting Clause; in this Case the *Venire*, the Return of the Process, *&c.* are entered in the same Form as Proceedings at Common Law; and if they are considered as such, there is a manifest Error. Rules for Trials by special Juries are taken by Exception out of the Act; it must be considered therefore by what Authority the Rule in this Case was granted; for before the Act, Rules of this Kind were never granted but upon Consent of Parties; the Power therefore which hath been exercised in this Case is wholly depending and flowing from

from the Act, and so it ought to have been suggested upon Record. The Act of Parliament excepts special Juries appointed by Rule of Court, and says further, that the Jury so struck shall be the Jury returned to try the Issue; and it is by this Authority that twenty-four only are returned. Supposing there had been no Rule at all, that undoubtedly had been Error; here does not appear to be any Rule in this Case, nothing of that Matter is suggested upon Record; *and the Court can take no Notice of any Thing now but what appears upon Record; it is for that Reason that the Rule, which is the essential Part of a Trial of this Nature, ought to be entred upon Record.* In the Case of *Savill* and *Candish*, *Yelv.* 213. a (87.) *Tales de Circumstantibus* was awarded, and the *Tales* returned upon the *Postea*; but because it was not suggested upon the Record that the *Tales* were *Nomina Jurator' de novo apposit' secundum formam Statui*, *Judgment was arrested*; for this ought to have been done, because at Common Law the Justices of Assize could not grant a *Tales* to supply the Defects of the first Jurors, which Power is meerly by 35 *H.* 8. and for this Reason it ought to be particularly entred *Quod nomina jurator' de novo apposit' secund' formam Stat'*, to distinguish what is done by the Common Law and what is aided by the Statute. *This Case is of great Weight in the present Objection*, for in the Case before the Court there appears nothing to shew how this Jury was impanelled, whether by Common Law, or by Virtue of the Statute, and what makes a Suggestion more necessary in

in this Case than in the other; in this Case there might be Proceedings at Common Law, or it might be by Proceedings upon the Statute; whereas in the other Case the Jury was returned upon the *Postea*, which shewed that the Trial could only be by Virtue of the Statute; but it will be answered, that here the Entry will be made according to the established Practice. This Argument was insisted upon in *Yelverton* 23. and divers Precedents were shewn, where *Nom' jur' de novo, &c.* were omitted upon the Panel, yet the Court did not regard it; for it seemed to them that those Cases had passed *sub silentio*, and without Exception. *In all Cases where a new Law is introduced, which takes the Course of Proceedings out of the common Road, a Suggestion is always entered upon Record*; as where a *Venire is directed to the Coroner upon a Challenge to the Sheriff*; *so where the Trial is per Medietatem Linguæ*; in these Cases a *Suggestion is always made accordingly. When a Defendant is convicted of a Misdemeanor, and before Judgment claims the Benefit of the King's Pardon, and that is allowed, it is always suggested upon Record*, Nihil de fine quia pardonatur; *and so* Cro. Eliz. 153. Lee *versus* Curveton; *and* Cro. Jac. 207. Strickland *and* Thorp. *Where a Defendant prays leave of the Court to plead double, Suggestion is always made upon the Record* cum licentia Cur' secundum form' Stat' in ejusmodi Cas' edit' & provis'. This seems to be a Case in Point; the Act provides that the Defendant may plead *double by Leave of the Court*; and where this Leave is once obtained, *it is always*

always entered upon Record as above, otherwise it would be Error; after the Restoration, in all Cases, where the *Act of Indemnity was pleaded*, the Party was obliged to *suggest his Plea, that he was not the Person who struck the King's Head off*, &c. *and the Reason of this Suggestion was, because the particular Person was excepted out of the Act.*

(88.) At Common Law, if twenty-three Jurors only were returned, it was Error; the late Act requires that forty-eight shall be returned, but special Juries are excepted out of the Act; in the present Case here are only twenty-four Jurors returned, which is Error, unless something appear upon Record to take this Case out of the general Provision of the Act; but nothing appears to this Purpose, and so there is a manifest Error; it does not appear this was a Trial by a special Jury, and so within the Exception of the Act, and the Court cannot *ex officio* take Notice of it. Unless the Rule be suggested upon Record, it will introduce Confusion and great Inconvenience. Suppose a Rule is granted, and the Cause comes on to Trial before a Judge who did not grant the Rule, how can the Judge take Notice of it? nothing of this Matter will appear upon the Record, and the Judge *ex officio* is obliged to see the Cause tried according to the Act, which, by the general Provision of the Act, must be upon the Balloting Clause, unless something appears particularly to take it out of the Clause. Upon a Writ of Error out of an inferior Court, where the Trial hath been by special Jury, and Objection is made to the *Venire*

Venire, how can the Courts above judge what is Error and what is not? and whether the Proceedings below were purſuant to the late Act of Parliament or not? it is impoſſible a right Judgment can be made, unleſs the Rule be ſuggeſted upon Record. Where there are ſeveral Cauſes of the ſame Nature depending in the ſame Court between the ſame Parties, and Rule is granted for a ſpecial Jury in one Cauſe, and another Cauſe is tried by a ſpecial Jury upon that Rule, ſhould this be alledged as Error? could not the Rule which was obtained in the firſt Cauſe be produced as Evidence, and warrant the Proceedings in this? It certainly might; for the Court could not diſtinguiſh upon the Face of the Rule in what Cauſe it was granted, and ſo the Defendant could take no Advantage by the Error. Since therefore there may be ſo great an Inconvenience introduced on the one Hand, and there can none ariſe on the other, we hope the Court will make ſuch a Determination as will be agreeable to Reaſon and Equity, *viz.* That it is neceſſary that the Rule ſhould be ſuggeſted upon Record, and that the Omiſſion of it is manifeſt Error.

Mr. *A. G.* Mr. *S. G.* *& al' cont'*: This is an Objection equally ariſing in every Caſe ſince the making this Act; and the ſame Method hath been obſerved in all other Caſes as hath been purſued in this, and there is nothing offered to induce the Court to alter the Method; but if it ſhould be neceſſary to ſuggeſt the Rule upon Record, we are ſtill in Time; for we have entered nothing yet but the *Similiter*,

(89.) *Similiter*, and so have still an opportunity of amending the Roll of *Nisi prius*, and suggesting the Rule upon Record. It is insisted upon, that the late Act is an Introduction of a new Law; it is expresly provided otherwise by the very Words of the Act, by which it is enacted, *That upon Motion made in any of the Courts at* Westminster-hall *for a special Jury, that the said Courts may order a special Jury to be struck in such Manner as such Juries are usually struck. This Clause of the Act is made in Affirmance of the Common Law*; and if at *Common Law no Suggestion was entred on Record, in Trials at Bar, and Trials by special Juries, what Reason is there to make any in this Case? By the Act there is an express Reference to the old Method of proceeding*; in this Case *the old Method is therefore to be observed.* In Trials at Bar, such a Suggestion never was made either before or since the Act; *and there is no Instance of a Trial's being set aside for this Defect.* If there had been no Rule at all, the Trial had been illegal, and not warranted by the Act; the Party indeed in that Case could not shew Error upon Record; but this does not conclude him from all Remedy; for upon Application to the Court, the Court would set aside the Judgment for Irregularity. *By the express Provision of the Act Trials by special Juries must be upon Application to the Court by Motion*; there is a great Difference between Things that must be done upon Motion and those Things which must be entred upon the Award of the Roll. *In the Case of the Coro-*

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ner there is no Motion made to have the Venire *directed to him, but it is done by Suggestion upon the Award of the* Venire; *and the Reason of this Direction is to prevent the Necessity of putting the Party to challenge the Array.* When a *Pardon is pleaded, the Entry is always, Nihil pro fine quia pardonatur*, but it does not say *how pardoned*; and whether by *Act of Parliament, or the King's Letters Patent.* Where the Party hath Leave to plead double, *it is always suggested upon Record*; but this does *not prove that the Omission of it would be Error*; and yet in this Case it is not prescribed by the Statute to be upon Motion, but only in general, that it must be by *Leave of the Court*; and where the Provision of an Act is in such general Terms, it may be thought necessary, as the most secure Way, to enter it upon Record; but where the Act is so restrictive, as to confine the Party to apply by Way of Motion, it is never done. *The Statute which prevents dilatory Pleas provides, that no Pleas shall be received in the Office but upon Affidavit of the Party to verify his Plea; but the Affidavit is never entered upon Record; no Complaint of any Inconvenience arising from this Practice; for if the Party refuse to make Affidavit, the Office will never receive the Plea, or if received, the Court will set it aside* (90.) *for Irregularity.* There is given by this Act a Power to the Judge of Assise to direct, that less than forty-eight shall be returned; and yet this Direction cannot be suggested upon Record, either before the Issuing of the *Venire*, or upon the Return of the *Postea*. The Case in

in *Yelv.* which is so much relied upon, *is of no Weight in the present Question*, the Trial by *Tales* is given intirely by the Statute, which in that Case is introductive of a new Law; for at Common Law there could be no *Tales*; and where-ever an Alteration is made either in the Process of the Court, or where the Trial differs from a Trial at Common Law, as in the Case of a *Tales* a Suggestion is necessary, and it must be entered upon Record *secund' formam Stat'*, *&c.* In this Case the Process of the Court is in no Respect altered; Proceedings by special Juries are left in the same Plight, and must be in the same *Methoa as before*; *the Venire* must be returned by the same Officer; and if in this Case a Suggestion is necessary, it is equally necessary upon the Balloting Clause. *Where a Rule is made to pay Money into Court, this Rule is never entered upon Record: Neither in Ejectment is the Rule, which the Defendant enters into to confess Lease, Entry and Ouster at the Trial, ever entered on the Roll*; and yet to the full as necessary as in the Case in Question. The Form of Proceedings by special Juries being a Method established by Rule of Court, if any Doubt arises relating to the Rule, it must be determined by the Court who granted the Rule. *If in* C. B. *several Actions of Trespass are depending between the same Parties, some by Original and some not, and a Dispute arises, on Error brought for Want of an Original, the Truth of the Fact must be* determined *in that Court where the Original first issued*; *and so no such Inconvenience can arise*

arise as pretended. That Precedents were of Authority in the present Case, *the Case of* Budley 11 Ann. *was cited.*

To this the Defendant's Counsel replied, Although it was said, that the Rule might still be entered upon Record, yet it was not thought proper to insist upon that Point, which was liable to so many Objections, and might so easily have been confuted. The late Act hath made a great Difference in the Manner of appointing special Juries; before the Act a special Jury was never appointed but by Consent of both Parties; but the Act enables the Court *ad libitum*, upon the Prayer of either Party, to appoint them; the Case of double Pleading is a *Case in Point*, and stands unanswered; *it is said, that the Statute directs that it shall be by Leave of the Court in general*, but that the present Case is confined to Motion; this is no Distinction; for where a Thing is to be done by *Leave of the Court, and where upon Motion, it is in Effect the* (91.)
same Thing; for Leave must be obtained of the Court by Motion, for the Court cannot grant *ex officio, without Application upon Motion.*

Unless upon special Juries the Rule be suggested upon Record, the Judge can have no Direction in what Manner to swear the Jury. Talesmen are excluded by the Balloting Clause; but it hath been adjudged, that in special Juries the Party is intitled to them. Unless therefore the Rule appears upon Record, what can induce the Judge to determine in what Cases the Party is intitled to a

Tales,

Tales, and in what not? Admitted, that before the Act there was no Necessity to suggest the Rule, *&c.* because no Difference in the Return of the *Venire*, as to special Juries and common Juries; but the Act hath now made it necessary; for by the general Provision of the Act *forty-eight must be returned*, except in special Juries; something therefore ought to appear upon Record to bring this Case within the Exception: Admitted likewise, that there was a Difference between Things done upon Record and Things done upon Motion. *But the Question is, where the Act hath introduced a new Law, whether the Court must not conform their Practice to the Intention of that Law; and if Error may arise upon Proceedings in this Law, the Proceedings ought to be suggested upon Record, to give the Party the Advantage of applying to Superior Courts in Order to have that Judgment reversed.* In the Case of dilatory Pleas, no Plea shall be received but upon Affidavit; but it is said the Affidavit is never suggested; nor is it necessary; for no Plea can be received but upon Affidavit; besides, what Occasion for a Suggestion, when Advantage may be taken of the Plea it self? for unless Affidavit, it is no Plea, and Plaintiff may sign Judgment. *In* Budley's *Case, there was Error appearing upon Record, and so that Case was not absolutely determined upon Precedents of the Practice of the Court; the Rule for bringing Money into Court is to be taken Advantage of upon Evidence, and cannot be suggested upon Record; for it is considered as Payment of so much*

much Money, and as such is given in Evidence. Ejectments are not parallel to other Cases, they are always considered as *Creatures of the Court; the Court will not permit the Plaintiff to release, will not permit the casual Ejector to bring a Writ of Error*, and in all *Respects are governed by the Directions of the Court*; and so whatever relates to them cannot be introduced as Authorities in the present Case.

Per Cur'. The Court delivered their Opinions separately to this Effect: The Determination of this present Case will depend much upon a Resolution lately delivered by the Court, which was *unanimous, that the late Act does not extend to special Juries, but leaves them as they were before at Common Law*; (92.) before the late Act Rules were often granted by the Court for special Juries; but that Rule was never entered on Record; and yet Proceedings by special Juries was as much contrary to the Common Law before the Act, as they are now contrary to the general Method prescribed by the Act; it would be odd to adjudge it necessary to enter the Rule upon Record, when it is no Ways conducive to the Trial. By the Balloting Clause a new Law is introduced, but the Act leaves this Case to the Directions of the Common Law; the Method of Proceedings that hath been pursued in this Case, is agreeable to the Proceedings at Common Law, and therefore not erroneous. *This is an Exception in Arrest of Judgment, and therefore must be an Error appearing upon Record*; but it is said, that Error does not appear upon the Face of the Record,

Record, because the Rule, which warrants the Proceeding by a special Jury, is not suggested upon Record. The Act looks upon Proceedings by special Juries, and Proceedings upon the Balloting Clause, to be equally beneficial, and was so looked upon by the Legislature. Special Juries not treated by the Act as introductive of a new Law, but leaves them to the Directions of the Court and the old Method of Proceedings in these Cases. *The Rule is no more than to direct the Officer in the Manner of returning his Writ, there is no Precedent to shew the Necessity of suggesting the Rule upon Record*; and it seems equally necessary to suggest every Rule of pleading upon Record; *if a Question arises, whether a Rule or no Rule, it must be determined in its proper Court; and if no Rule, the Court will relieve the Party by setting aside the Judgment.* Where an Exception is made, as in the Act of Indemnity, 12 *Car.* 2. 11. the Party, that will take the Benefit of the general Provision of the Act, must shew himself not to be included within the Exception, otherwise the general Provision of the Act will not extend to him. *Judge of Assise may direct a less Number than forty-eight to be returned*; and yet these Directions cannot be *entred upon Record*; this is a stronger Case than the Case in Question; this is drawn by Exception out of the Balloting Clause, and is giving a Power to the Judges which they had not by Common Law. *In all the Cases cited by the Defendant there is manifest Error appearing upon the Face of the Record; to plead double was*

Error

Error at Common Law; and therefore unless something be suggested upon Record, as cum licentia Cur' secundum form' Stat', &c. *to draw that Part of the Case out of the general Proceedings by Common Law, it still remains Error; so where the* Venire *is directed to the Coroner, for the Sheriff is the legal and proper Officer to make the Return, and therefore something must appear to shew why the* Venire *was not directed to him.* The same Reason for that Determination in *Yelv.* where although the *Tales* was suggested upon Record, yet that was not thought sufficient; for there could be no Trial by *Tales* at Common Law, and therefore necessary to suggest *Nomina Jurator' de novo apposit' secund' formam Stat'.* Had the present Case been equal to any of those, the Want of Suggestion would have been Error; but the Common Law supports Trials by special Juries, *and therefore the Want of the Suggestion is not Error at the Common Law; and so note a Difference, where an Act of Parliament makes an Alteration in the Common Law, and where it is made in Affirmance of it. Note;* Per Page *J. Though the Court did not grant special Juries without Consent before the Act, yet the Court had a Power to grant them.* (93.)

Per Cur': *Judgment must be affirmed. Note;* On the *last Day of this Term,* the Defendant being brought into Court to receive Judgment, Judgment was given against him accordingly, *viz. To pay* pro Fine 100 l. *to suffer one Year's Imprisonment, and to give* 2000 l. *Security for his Good Behaviour for seven Years.* Vide *Layer*'s and *Haines*'s Trial.

Washer *versus* Smith & *Ux'*, Term. Mich. 6 Geo. II. *B. R.*

Of Costs in Assault and Battery, on a Plea of Molliter manus imposuit, *where the Damages found were under* 40 s. *and Plaintiff had obtained no Certificate.*

ACTION of Assault and Battery. There were two Counts laid in the Declaration; *the first was against Husband and Wife jointly, and the second was against Wife only.* The Defendants, as to the *Vi & armis* in the first Count, pleaded Not guilty; and as to the Assault, they pleaded a Justification in Defence of Property by a *Molliter manus imposuerunt.* The Feme pleaded in the same Manner to the second Count; and upon both these Issues they went to Trial. The Jury found the Defendants guilty, but gave under 40 *s.* Damages.

Mr. *M.* Counsel moved, that the Plaintiff might have his full Costs, notwithstanding the Damages were under 40 *s.* and laid it down for a Rule, that whenever the Defendant pleaded specially, and there was a Verdict against him, the Plaintiff always had his full Costs, and there was no Necessity for a Certificate.

Mr. *F.* Counsel *cont':* The Plaintiff is not intitled to more Costs than Damages; and insisted upon the 22 & 23 *Car.* 2. *c.* 9. which enacts, That in Trespass, Assault and Battery, and other Personal Action, *if the Judge do not certify upon the Back of the Record, that the Assault and Battery was sufficiently proved, or that the Title of the Land mentioned in the Plaintiff's Declaration was chiefly in Question, the Plaintiff, in case the Jury shall find the Damages*

(94.)

Damages to be under 40 s. *shall recover no more Costs than Damages.* Here is no Certificate that the Battery was fully proved, and nothing to distinguish it from the common Case, where Not guilty is pleaded. *Where the Defendant pleads* Son Assault, *he confesses the Battery, and therefore no Occasion for a Certificate; but here the Battery is denied, and the special Pleadings go only to the Assault.* Supposing the Defendants had pleaded generally Not guilty, and the Plaintiff had proved that they *Molliter Manus imposuerunt*, without any Thing further, would the Judge have certified it in this Case? there is no more Reason to give Costs, because the Defendants have pleaded specially, than there would have been had the general Issue only been pleaded.

L. J. An odd Doctrine, that when the Defendant pleads specially in these Cases, the Plaintiff must have full Costs; *indeed when* Son Assault *is pleaded, the Battery is admitted in express Terms, and amounts to a Certificate*; but *Molliter manus imposuit* goes only to the Assault, and the Defendants as to the Battery have pleaded Not guilty.

Cur': The single Question is, Whether *Molliter manus imposuit* does not admit a Battery? *Adjornatur.*

Martin *ver.* Allthom, Mich. 6 Geo. II. *B. R.*

On a frivolous Plea, the Defendant being an Attorney ordered to attend.

ACTION upon a Promissory Note which was given and wrote by the Defendant himself, who was an *Attorney*, and in the Note the Plaintiff was named *Marten* with an *e*, but the Plaintiff in the Declaration named himself *Martin*; and this the Defendant pleaded in Abatement, *viz.* that the Plaintiff's Name was *Martin*, whereas the Note was given to one *Marten*.

Mr. *T.* Counsel moved to *set aside the Plea with Costs, and the Plaintiff might be at Liberty to sign Judgment as if no Plea had been put in.* The Court held the Plea to be *frivolous, and reproved the Counsel for setting his Name to a sham Plea*, and made a Rule to discharge the Plea; *and that the Defendant, being an Attorney, should attend.*

(95.) Hoar *versus* Gates, Mich. 6 Geo. II. *B. R. Vide ante & post* Hil. 7 Geo. II.

Where the Party is not estopped by the Record to aver the very Time of the Purchase of the Writ.

THIS Case was again argued, and for the Plaintiff insisted, that the Rejoinder was bad; for a Bill of *Middlesex* cannot be supposed to issue but in Term-time; besides, it is Matter of Record, and the Parties cannot aver contrary

contrary to that. *Lutw.* 232. 1 *Sid.* 53, 60. *Styles* 156. It is in the Nature of an Original. *Carth.* 232. 2 *Show.* 253. 4 *Mod.* 9. *Cro. Car.* 264. 1 *Roll. Abr.* 893. 1 *Mod.* 158. *Cro. Eliz.* 181. *Carter* 227. *Hob.* 156, 297.

Mr. *R.* Counsel *cont'*: The Rejoinder in this Case is only an Answer to the Plaintiff's Replication, which goes to Matter of Fact only, *viz.* that he prosecuted his Bill of *Middlesex*, *Hil.* 13 *Geo.* 1. returnable the Term following. To this the Defendant rejoins what is Matter of Fact also, *viz.* that *in rei veritate* the Plaintiff did not prosecute his Bill in *Hil.* but that it issued afterwards, and not till the 30th of *March*; which being Matter of *Fact only*, *is confest by the Demurrer.* The Cases that have been cited are all of them Cases upon *Latitats* which bear *Teste*, and that it is which makes the Estoppel, for the Record is against him; *but in the Bill of* Middlesex *there is no* Teste, *which makes a great Difference.* Supposing upon a *Latitat* the *Teste* should be omitted, the Court would take no Notice of it by Way of Estoppel, but it may be averred against. The Case in *Lutw.* is not to the Purpose, for there the *Teste* appeared upon Record. Supposing a Man should be arrested in Vacation, without any Writ being sued out, and afterwards the Plaintiff should take out a Writ, pretending that it issued out the Term preceding, is the Defendant estopped to aver *in rei veritate* when the Writ issued? *Vide* 2 *Keb.* 173, 198. 3 *Keb.* 213. When the Statute of Limitations hath given a Man a legal

legal Advantage, tho' it is a hard Case, yet this Method shall not avoid it.

Cur': The Bill of *Middlesex* is the Award of the Court, but the Party is not concluded by that Award. The Statute of Limitations is a remedial Law, and made to preserve Peace and Quietness, that People must either prosecute their Actions in Time or not at all; it was the Plaintiff's Fault he did not take out his Bill sooner. There is a strong Case in *Thos. Raym.* 161. the Case of *Bilton* versus *Johnson*, (96.) which will go a great Way in determining this Point. *Vide* the Case; where it is held, that tho' the *Teste* of a *Latitat* is upon Record, and the Party cannot aver against it, yet there would be great Inconvenience, if he could not set out the very Time of the Purchase of the Writ; and the Relation of the *Teste* is only to prevent Fraud, and not justify a Tort. The Court further held, that the Plaintiff in this Case had no Remedy for his Debt, by Reason of the Statute of Limitations, unless given him by this Fiction in Law; and it would not be right for the Court to give Remedy by Fiction, where it is expresly prohibited by the Statute. *Adjornatur.*

Pitman *ver.* Hardy, Mich. 6 Geo. II. *B. R.*

Debt brought on a Warrant of Attorney to confess Judgment.

THE Defendant gave a Warrant of Attorney to confess a Judgment, *Pasch.* 5 *Geo.* 2. but *Judgment was not entered up that Term*; afterwards

afterwards the Plaintiff brought an Action of Debt, and declared upon this Warrant of Attorney; to which the Defendant demurred. Mr. *G.* Counsel insisted, that the Defendant, by his Warrant of Attorney, had confessed the Debt.

The Court said, they never heard of an Action being brought upon a Warrant of Attorney; that the Judgment not being entred within the Time limited, the Authority was determined; nor can the Warrant of Attorney be any Acknowledgment of a Debt; and so *Judgment for the Defendant* per totam Cur'. Jud' pro Def'.

Wilkinson *versus* Draper, Mich. 6 Geo. II. *B. R.*

MR. F. *Counsel moved to set aside a Verdict, because there was a special Plea and Replication, and no Entry was made thereof with the Clerk of the Papers*, which is irregular and contrary to Practice. Mr. *S.* Counsel: The Defendant should have objected to this in proper Time, but after Verdict it is too late to take Advantage of it.

Verdict set aside, because the Pleadings which were special, were not entred with the Clerk of the Papers.

But the Court said they would not suffer the Officer to be cheated of his Fees; and so set aside the Verdict, and obliged the Parties to go back to the first Fault.

Daniel

(97.) Daniel *ver*. Purbeck, Mich. 6 Geo. II.
B. R.

Costs for not Countermanding a Notice of Trial in Time.

MR. *S.* Counsel: *It is an established Rule in this Court, that where Notice of Trial is countermanded, the Countermand to save Costs must be two Days before*, &c. *in a Town-Cause, and four Days in a Country Cause.* Notice of Trial was given in this Case for the 19th of *August* at *Warwick*, and no Countermand till the *Sixteenth*; he therefore moved, that the Defendant might have his Costs; there is no Respect to be paid to the Circumstances of the Case, but the Rule is general, and must be pursued; and the Court ordered accordingly, that the Defendant should have Costs.

Daniel *versus* Purkis, Mich. 6 Geo. II.
B. R.

Motion for a new Writ of Inquiry, the Jury having found Damages for the Defendant.

ACTION by the Plaintiff, who was an Attorney, for his Fees; pending which the Parties came to an Agreement, that, upon Payment of so much Money by the Defendant, Proceedings should be stayed. The Defendant paid the Money, and took a Discharge from the Plaintiff; notwithstanding which the Plaintiff afterwards proceeded to Judgment, and gave the Defendant Notice of executing a Writ of Inquiry; a Writ of Inquiry was executed accordingly, and the Jury,

Jury, upon the *Circumstances of the Case, gave one Penny Damages for the Defendant.*

Mr. *P.* Counsel moved for a new Writ of Inquiry; upon Issue joined the Jury may find for the Plaintiff or Defendant, at their Discretion; *but after Judgment they are only to inquire into the* Quantum *of the Damages the Plaintiff has sustained, and cannot give Damages against him*; and of this Opinion was the Court, and therefore thought a new Writ ought to go.

Mr. *S.* Counsel *cont': It must be upon the common Terms then, upon Payment of Costs.*

Mr. *P.* Counsel cited the Case of the Earl of *Rotchford* and *the Bishop of* Norwich *in the* C. P. A *Quare Impedit* was brought, and Judgment by Default, and upon executing a Writ of Inquiry, the Jury found there was no such Church; and upon that Application was made to the Court, who granted a new Writ without Payment of Costs.

Mr. *S.* Counsel: The Reason is, because no Costs are given upon a *Quare Impedit.* It is the constant Practice to pay Costs upon Motions of this Nature; if the Plaintiff will waive his Judgment, we will waive our Costs, and plead the General Issue. *But the Plaintiff not consenting, the Court inlarged the Rule.* (98.)

The

The King *versus* Anne, *Ux'* of Hannibal Cartor, Mich. 6 Geo. II. *B. R.*

One committed as a loose, idle disorderly Person, till she find Security, bailed on a Habeas Corpus.

THE Defendant, being a Negro Slave, was carried by her Master before a Justice of Peace, who committed her to *Bridewell* as a loose, idle disorderly Person, and for Insulting and Abusing her Master. It was further set forth, that she was committed for Want of Sureties; and Directions to the Gaoler to keep her till she found good and sufficient Bail; she was now brought down by *Habeas Corpus*, and Mr. *K.* Counsel moved to have her discharged; the Commitment is by one Justice of Peace only, and is not a *Conviction* upon the Act of Parliament, like *Mary Talbot*'s Case; for there she ought to have been sent to the *County-Gaol.* She is committed as a *loose, idle disorderly Person, for Insulting and Abusing her Master*; if the Court is of Opinion that the Commitment is legal, we have got good Bail for Sureties.

Mr. *R.* Counsel *cont':* The Insulting and Abusing her Master is an Offence bailable; *but being committed likewise as a loose, idle disorderly Person, she is not bailable.*

Cur': By the Commitment the Gaoler is charged to keep her in Custody only till she find Security. There is no certain Time limited in the Commitment how long she shall remain a Prisoner, as till the next Sessions, *&c.* and so by this Means she may remain a Prisoner for Life.

Mr.

Mr. *R.* Counſel then offered to prove her a Slave, and that the Maſter might keep her a Priſoner, if he pleaſed; but the Court would not ſuffer him to enter upon that Point. She is committed for Want of Sureties, and muſt be bailed if ſhe hath got any. There was an Affidavit read that ſhe was married to a Freeman.

Berrington *verſus* Parkhurſt, Mich. 6 Geo. II. *B. R. Vide poſt.*

Amendment of Iſſue in Ejectment.

(99.)

MR. *R.* and Mr. *F.* moved to ſhew Cauſe. *This is a Rule to amend a Declaration in Ejectment, by altering the County and laying the Demiſe in* Bucks, *whereas now it is for Tithes in* Middleſex. This Amendment *goes to the very Subſtance and Jett of the Action, and the Defendants have pleaded to the Demiſe, as laid in the Declaration. There is a Difference between Actions in Ejectment and all other Caſes;* and the Court will never ſuffer the Plaintiff in Ejectment to amend his Declaration.

Mr. *A.* Counſel *cont':* The Court have frequently ſuffered the Plaintiff to amend his Declaration, where the Miſtakes have been more material. *In* Aſſumpſit *by the Executors of the Duke of* Marlborough, *the Court gave the Plaintiffs Leave to amend, by laying the* Aſſumpſit *as a Promiſe made to them, whereas before it was laid as a Promiſe made to the Duke himſelf.* So where the Word *Felonice* hath

hath been omitted, the Court have given Leave to amend after Issue joined, and the Cause been actually carried down to Trial. Ejectments are the Creatures of the Court, and therefore may take greater Liberties in rectifying these Mistakes. *In this Case the Declaration which was delivered in the County is right, it is the Declaration in the Copy of the Issue which is wrong.*

Cur': *We never suffer Declarations in Ejectment to be amended where it alters the Substance of the Action; but if the Declaration delivered in the County is right, the Copy of the Issue may be amended by it; but here the Rule is only to amend the Declaration, and you cannot amend the Copy of the Issue by this Rule*; and therefore the Rule must be *discharged.*

The King *versus* Inhabitants of *Ecclesshome*, Mich. 6 Geo. II. *B. R.*

Highways.

MR. *P.* for a *Certiorari* to remove an Order of the Justices relating to the Repairs of the Highway, and obtained a Rule to shew Cause. Mr. *L.* There is no Act which prescribes a Method for the Repair of the Ways but the 3 & 4 *W.* & *M.* by that Statute, no *Certiorari* lies, unless the Right come in Question; by 7 & 8 *W.* when a Township is not able to repair the Ways, if the Inhabitants will contribute 6 *d. per Pound, the Parish is to repair*; but how? by the Method prescribed by 3 & 4 *W.*

Cur':

Cur': How can the Justices make an Order to repair, and how can they make a Rate but by 3 & 4 *W.*? Rule discharged.

Berrington *versus* Parkhurst, Mich. 6 Geo. II. *B. R. Vide ante.* (100.)

Issue in Ejectment amended by the Declaration.

MR. *A.* now moved again to mend the *Copy of the Issue by the Declaration delivered*, by changing the County from *Middlesex* to *Bucks*, *which was granted by the Court*; but they refused to let the Plaintiff strike out *Tenementa prædict'*, and insert *dimissa præmissa* instead of them, or to let him strike out *the* 5 *s. Rent.*

Lance *versus* Draper, Term. Hil. 6 Geo. II. 1732. *B. R.*

Motion to quash a Testatum Ca' Sa' *for a Variance between the Writ and Record.*

PLaintiff had Judgment to recover his Debt and 5 *l. pro Dam' & Custagiis.* The Defendant brought Error; and Judgment being affirmed, the Plaintiff had 12 *l.* for his Costs allowed him upon the Writ of Error. Whereupon he took out a *Cap' ad satisfaciendum* to levy the Debt and Costs upon the original Judgment *acetiam* the 12 *l.* Costs upon the Writ of Error. The Plaintiff afterwards took out a *Testatum Ca' Sa'* to levy the Debt and Costs recovered below, but took no Notice of the Costs upon the Writ of Error.

Mr.

Mr. *R.* Counsel moved to quash the *Testatum Ca' Sa'* for this Variance.

Mr. *S. cont':* Here is no Variance, but the *Testatum* is agreeable to the original Record; before the Statute for Amendment of Writs of Error, where the Writ contained more than the original Record, that was always held to be a material Variance; but where the Writ contained less, as where Judgment was against *A.* of *B.* in the County of, *&c.* and a Writ of Error had been brought to reverse the Judgment against *A.* without mentioning the Addition, yet the Writ was always held sufficient; and the Reason is, because it is agreeable to the original Record; and tho' it is not set out in so full a Manner as it might be, yet there is sufficient to make it answer the original Record.

But the Court took Time to consider.

(101.) Kent & Ux' *versus* Wright, Hil. 6 Geo. II. *B. R.*

Bond conditional.

THE Defendant and another were jointly and severally bound in a Bond of 200 *l.* conditioned to pay 100 *l.* at a Day certain; but it was further provided, that if the other Obligor became insolvent, that then the Defendant, upon Payment of 50 *l.* at the Day, should be discharged of the Bond. The Plaintiff brought his Action upon this Bond against the Defendant, who paid 50 *l.* into Court, and then pleaded a Tender, and that the

the other Obligor was become insolvent; the Plaintiff took the 50 *l.* out of Court, and then demurred to the Defendant's Plea, in order to have his Damages and Costs; whereupon the Defendant moved the Court to stay Proceedings.

Mr. *T.* Counsel for the Plaintiff insisted, that the Tender was not well pleaded; for that it did not appear when the other Obligor became insolvent; and if he did not become so till after the Day of Payment, then the Condition was broke, and the whole Penalty forfeited; and cited 2 *Cro.* 594.

Mr. *S.* Counsel *cont'*: The Defendant must go before the Master to see what Damages accrued before the Money was paid into Court. The Plaintiff insists, that the Tender is not well pleaded; *but he has waived that by taking the* 50 l. *out of Court*, so that nothing is now to be considered but the Costs and Damages.

Cur': The Condition of the Insolvency must have Reference to the Day of Payment; but if the Insolvency happened after that, the whole is forfeited; it does not appear by this Plea when the Insolvency happened, but the *Plaintiff has waived this by accepting the* 50 *l.* and so referred it to the Master, to see what was due for Costs and Damages before the 50 *l.* was brought into Court.

Musgrave

Musgrave *ver.* Povee, Hil. 6 Geo. II.
B. R. Vide post.

Prohibition to a Libel in the Spiritual Court for Words.

(102.)

THE Defendant was *libelled* against in the Bishop of *Ely's Court*, for calling the Plaintiff *Rogue and Rascal.*

Mr. *F.* Counsel moved for a Prohibition, and suggested that these were Words *only of Heat and Passion, and occasioned by the Plaintiff's giving ill Language first, and calling the Defendant a Lyar. These Words are not punishable in the Spiritual Court.* To shew Cause.

Crips *versus* Lander, Hil. 6 Geo. II.
B. R.

Error.

MR. *M.* Counsel for the Plaintiff in Error. *Assumpsit* against the Defendant an Attorney in *C. B.* by Bill, *Hil.* 5. *Geo.* 2. and an Imparlance to a Day certain in *Easter* Term; Judgment for the Plaintiff by Default, and a Writ of Enquiry taken out returnable *Cras' Ascens' Dom'*, which is the last general Return in *Easter* Term, and thereupon final Judgment. And the Error insisted upon was, *that Bills in* C. B. *are of the same Nature with Bills in this Court, and that all Process issued out in Consequence thereof ought to be made returnable at a Day certain.* That this Error is a Misaward of Process, and not amendable within

within any of the Acts of *Jeofails*, *which extend only to Judgments after Verdict.*

S. Counsel: This is a *Discontinuance*, and aided by 32 *H.* 8. which aids Discontinuances after Verdict only; but the late Act for Amendment of the Law extends to *Judgments by Default*, *and* brings them within the Remedy of that Statute; and the Case of *Leppor* and *Hobbs was cited by Mr.* Draper (amicus Cur') which Case was in *Pasch.* 3 *Geo.* 2. *Action against the Defendant an Attorney* in *C. B.* by Bill, and Judgment by Default; the Plaintiff took out a Writ of Inquiry, returnable at the General Return; Error was brought in this Court, and held to be within the Statute of *Jeofails.*

The same Cause argued again.

Mr. *S.* Counsel now spoke to this Cause again, and said it was nothing but a Miscontinuance aided by 32 *Hen.* 8. and cited the Case of the *King* and *the Bishop of Meath in Ireland*; which was a *Quare Impedit* returnable at a Day certain, but the Return in the *Venire* was made upon the general Return-Day, and a Writ of Error being brought in this Court, *Pasch.* 3 *Geo.* 1. this was assigned for Error; and after it had been spoke to several Times by the Counsel at the Bar, *Parker* C. J. in *Trin.* 3 *Geo.* 1. delivered the Opinion of the Court in Confirmation of the Judgment; that *this was amendable by the Statute, being only a Miscontinuance of the Process, and cited* 1 *Inst.* 325 *a.* the Difference (103.)

between a Discontinuance and a Miscontinuance. *A Discontinuance in Process consisting in not doing where a Process is not continued; and a Miscontinuance is when one Process is awarded instead of another, or when a Day is given which is not legal.* It was likewise held, that this Statute extended to Civil Causes at the Suit of the Crown. As to the Case of *Lepper* and *Hobbs* he said, he had looked into it, but it was entered with an *Adjornatur* only, and not determined. The Court held the first Case to be in Point; and that there was no Difference, only in the present Case the Jury appear upon a Writ of Inquiry, and there they were returned by *Venire*; and so Judgment was affirmed *per Cur'*. And it was adjudged afterwards in *Easter* Term following, *inter Burrows* versus *Dogley*.

Musgrave *ver.* Povee, Hil. 6 Geo. II.

B. R. Vide ante.

Prohibition.

MR. *F.* Counsel moved to shew Cause, *&c.* These Words being spoken by one Clergyman against another, are Words of Scandal and Detraction, and *properly within the Cognisance of the Spiritual Court, and cited* 2 Roll. Abr. 295. *pl.* 8. 297. 2 Lutw. 1053, 1054, 1055. 3 Lev. 17.

Mr. *F.* Counsel *cont'*: These are only Words of Heat and Passion, and in no wise reflecting upon his Function, and cited *Comb.* 253. 2 *Show*, 454.

Cur':

Cur': In the sixth of the late Queen this Distinction was taken upon Motion of the like Nature. Where the Words in themselves *import a Reflection upon the Profession or Business of another Person, and where they are general, and have no Tendency to any particular Function, as in the Present Case; Rogue and Rascal are general Words, and do not in the least relate to the Function of a Clergyman; and therefore made the Rule absolute for the Prohibition.*

The King *ver.* Moor, Hil. 6 Geo. II. *B. R.*

Perjury. Motion to quash the Indictment.

INdictment for Perjury removed by Certiorari *into this Court; the Defendant carried down the Record, and gave Notice of Trial, but not being ready with the Evidence he never entered the Record, and therefore was obliged to pay the Prosecutor Costs. And now in this Term*, Mr. *S.* Counsel moved in Behalf of the Prosecutor to *quash the Indictment.* (104.)

Mr. *F.* Counsel *cont'*: The Prosecutor is now too late; the Defendant has pleaded, and the Parties are at Issue. If the Indictment is now quashed, it must be upon Payment of the *Defendant's Costs*; and of this Opinion was the Court. And because the Prosecutor would not agree to pay Costs, the Court refused *to quash the Indictment.*

Harcourt *versus* Seagrave, Pasch. 6 Geo. II. *B. R.*

Special Demurrer waived, and Nil debet *pleaded to Debt on a Judgment.*

ACTION of Debt upon a Judgment; Defendant demurred specially, and there was a Joinder in Demurrer; but *before the Time for Pleading was out, the Defendant struck his Demurrer out of the Paper, and pleaded* Nil debet per Patriam.

Mr. *B.* Counsel to set aside this Plea. *Whenever the Defendant Demurs specially, and afterwards waives his Demurrer, he can plead nothing but the General Issue;* but Nil debet *is no Plea to an Action of Debt upon a Judgment.*

Refused to be set aside on Motion.

Sed per Cur': In all Cases where a Plea in Bar is pleaded, we never suppress it upon Motion; Nil debet *is a general Issue; and tho' it may not be a proper Plea in this Case, yet it is a Plea in Bar, and so falls within the general Rule; if the Plea is ill the Plaintiff may demur.*

Hil. *versus* Sir Thomas Reynolds, Pasch. 6 Geo. II. *B. R.*

Demurrer. Motion to set it aside.

UPON Motion to set aside a Demurrer, the Case was this: Action upon several Covenants; the Defendant, without craving Oyer of the Indentures, set forth Indentures of Covenant in his Plea, and then demurred generally to the Declaration;

Declaration; but the Court set aside the Demurrer; because the Defendant cannot set forth any Deed, &c. *without craving Oyer.*

Sed Quære. *For tho' the Party demanding is not bound to plead without it, yet he may plead without it, if he will, on taking upon himself to recover the Bond or Deed; tho' if he plead without Oyer, he cannot after waive his Plea and demand Oyer.* Mo. Ca. 28. (*i. e.* 6 Mod.) 3 Salk. 119. *and in* Wymark's *Case*, 5 Rep. 74. A Defendant pleaded a Deed without a *Prof'*, *&c.* the Plaintiff confessed a Deed, but without Oyer shewed the Condition, and assigned a Breach; and held good. (105.)

Heron *ver.* Bushell, Pasch. 6 Geo. II. *B. R.*

Error coram vobis *will not lie after Affirmance.*

ACTION *in the Palace-Court*; the Defendant being a married Woman *pleaded Coverture*, but the Plea being over-ruled Judgment was given against her. A Writ of Error was brought in *B. R.* and general Errors assigned, and upon that Judgment affirmed. *Defendant then brought Error* coram vobis, *intending to assign Error in Law; and thereupon the Plaintiff moved to have Execution; for after Judgment affirmed by Writ of Error* coram vobis *will not lie*; but in Support of this Writ was cited the Case of *Tompson* and *Lyon*, *Pasch.* 4 *Geo.* 2. *In an Action in the* Marshalsea-*Court*, *the Defendant gave Coverture in Evidence, notwithstanding which Judgment*

ment was given against her; whereupon she brought Error in this Court, and Judgment was affirmed; she afterwards brought Error coram vobis, *and assigned for Error that she was a Feme Covert, and the Court allowed this for Error in Fact, and reversed the Judgment. But the Court afterwards in the present Case granted the Motion, and held, that Error* coram vobis *will not lie after Affirmance of Judgment; for this Writ shall not be allowed but at the Discretion of the Court; and* L. J. *cited* 1 Ventr. 31. Vide Cro. El. 281. *Error coram vobis.*

Charlton *versus* Bankcroft, Pasch. 6 Geo. II.

Error.

AFTER Judgment in B. R. *the Parties entered into an Agreement not to bring Error in Parliament, notwithstanding which the Defendant brought Error,* &c. *upon this the Plaintiff applied to the Court to quash it, and had a Rule accordingly; upon which he immediately took out Execution*; and the Court being now moved to set aside this Execution, it was insisted upon, and so ruled by the Court, *that the Rule was no Supersedeas to the Writ of Error; if the Defendant refused to obey the Rule, the Plaintiff might have had an Attachment; but while the Writ was in Being the Plaintiff could not sue out Execution.*

Darby

Darby *versus* Gold, Pasch. 6 Geo. II. *B. R.* (108.)

Record of Nisi prius *lost. Motion to make a new one.*

ACTION *of Debt upon a Bond, and a Verdict for the Plaintiff; but the Record of* Nisi prius *being lost, Mr.* F. *Counsel moved for Leave to make a new Record, and cited the Case of* Harvey *and* James, 1 Vent. 92. 93. and said, there were several other Cases to this Purpose; and upon this a Rule was made accordingly.

In the Case of Needham *and* Granger, 9 Geo. 1. *the* Distringas *being lost a new Writ was granted* per Cur', *returnable by the Sheriff of* Bristol.

Jurants *ver.* Williams, Pasch. 6 Geo. II. *B. R.*

Error.

ERROR *upon a Judgment in* C. B. *upon an Action brought by an Attorney of that Court by Bill against the Defendant Executor,* &c. *for his Fees and Business solicited for his Testator; and the Declaration set forth, that the Defendant being indebted to him in the Sum of* 6 l. *for Business done and performed,* &c. *he in Consideration* inde *promised to pay him* 60 l. *Defendant pleaded several Judgments had against him as an Executor, and that he had not Assets* ultra *to satisfy the Plaintiff's Demands. The Plaintiff confessed the*

the Defendant's Plea, and entered Judgment with Prayer of Execution of Assets quando acciderent; *and a Writ of Error being brought upon this Judgment*, Mr. *M.* Counsel *took two* Exceptions, *first*, That this being an Action upon several Promises, the *Consideration must be mutual*, or otherwise the Action will not lie; and the Sum of 6 *l.* *is not sufficient to raise a Consideration for the Payment of* 60 *l.* His second Objection was, that the Proceedings being by Bill, the *Defendant* in his Plea ought to have concluded *no Assets die impetrationis Billæ*, and not as he has done in this Case, that he had no Assets *die impetrationis Brevis originalis.*

Mr. *D.* Counsel *cont':* As to the first Objection he said, the *Sexagint' Libras*, mentioned in the Consideration, was only Surplusage, and the Declaration is well enough without it; for it is said in the Consideration *inde* he promised to pay *prædict' Sexagint' Libras*; so that if the *Sexagint'* be omitted, the *prædict' libras* is good. To the second *Objection he said, if the Defendant's Plea is*
(107.) *naught, Judgment must be for the Plaintiff in either Court, for the Defendant cannot take Advantage of his own Error*; and the Judgment was affirmed *per Cur'*. *Vide* 1 *Lutw.* 445. *Cro. El.* 647. *Palm.* 74. *Savil* 31. *Sexagint'* rejected as Surplusage. *Cro. El.* 747. *pl.* 28. *the Sum of* 10 l. *sufficient to raise a Consideration for Payment of* 100 l.

King

King *versus* Horwell, Pasch. 6 Geo. II. *B. R.*

Certiorari.

MR. R. *Counsel, to quash a Certiorari*, which was granted to remove several Orders of Justices of the Peace, that were made at the General Sessions for the Repair of Highways, according to a Power granted to them by the 3 & 4 *W.* & *M. c.* 12. *by Virtue of which Statute, the Justices may in Sessions order an Assessment to be made to repair the Highways*, &c. *provided such Assessment does not exceed* 6 d. *in the Pound; and it is further enacted by the same Statute, that all Matters concerning Highways*, &c. *shall be determined in the County where the same do lie, and not elsewhere; and that no Presentment, Indictment or Order, made by Virtue of this Act shall be removed by* Certiorari *out of the said County into any other Court.* Per Cur': *A Rule to shew Cause.*

Goodtitle *ver.* Pettoe, Pasch. 6 Geo. II. *B. R.*

Ejectment.

IN *Ejectment the Case was thus:* Birk *being seised of Lands in Fee covenanted, (out of the natural Love and Affection which he had for his Wife* Anne, *and for her better Provision and Maintenance after his Decease), to stand seised to the Use of himself and* Anne *his Wife during*

during their Lives, and the Life of the Survivor of them; and after his Decease, and the Decease of the Survivor of them, then to the Issue of their two Bodies lawfully to be begotten; and for Default of such Issue, Remainder to his Wife for Life, with a Power to limit over the Estate to such Persons, and to such Uses, as she should appoint; and for Want of such Appointment, Remainder to William Thornton, *the Lessor of the Plaintiff in Fee. Birk* died without Issue; *Anne* entred: and by Lease and Release conveyed the Lands in Question to her Sister *Jane Smallpiece* in Fee, who made
(108.) a Lease of the Premisses in Question to the Defendant. *Anne* dies; after whose Death *William Thornton* enters; upon whom *Pettoe* the Lessee of *Jane Small-piece* re-enters, *upon which the Ejectment is brought. And this Matter being made a Case for the Determination of this Court*, Mr. *R.* Counsel argued for the Plaintiff, and Mr. *F.* for the Defendant.

Mr. *R. the Doubt in Question depends upon these two Points*, viz. *what passed by the Lease and Release to* Jane Smallpiece; *and if it should be adjudged that nothing passed by that Conveyance, then* 2dly, *whether the Limitation of the Use to* William Thornton *was a good Limitation to raise a Use to him or no.* As to the first Point, whether a Use is raised by Fine or Feoffment, there is no Occasion for any Consideration; because the Uses are raised out of the Estate of the Trustees, in whom the whole Fee-simple is vested; *but in all Cases upon Covenants to stand seised, the Use arises out of the Estate of the Covenantor, in whom*

whom the Fee remains till the contingent Use arise; and therefore there must be a Consideration, otherwise no Use can arise upon such Limitations. 2 *Sid.* 66. Natural Love and Affection is a good Consideration by Reason of Proximity of Blood; so the Love and Affection which a Man bears towards his Wife, is a good Consideration; *but where there wants Privity of Blood, or a valuable Consideration in Money, there the Limitation is absolutely void.* In this Case therefore the Limitation of the Use to the Wife is a good Limitation, there appearing a sufficient Consideration upon the Face of the Deed itself to raise a Use to her; she takes an express Estate for Life; but what makes the Doubt in this Case is, the Power which is given to the Wife of Limiting over the Estate to such Persons, and to such Uses, as she shall appoint; so that here is no *Cestui que Use* named in certain, neither can any Consideration be intended in Blood; if *Jane Smallpiece* hath any Title, she must claim by the first Covenantor; *but she cannot claim under him, because she is a Stranger to the Covenantor, and likewise there is no Consideration; supposing the Covenantor had covenanted out of Love*, &c. *to his wife to stand seised to the Use of his Wife for Life, Remainder to* Anne Smallpiece; *in this Case no Use could arise to* Ann Smallpiece; *for there is no Consideration either express or implied, and being altogether a Stranger in Blood, she cannot claim under the first Covenant. Nor can any Consideration be averred in this Case, because the Appointee, at the Time of raising*

raising the Use, was uncertain, and this agrees with *Mildmay*'s Case. Where Uses are raised by Covenant in Consideration of paternal Love, *&c.* or for the Advancement of any of his Blood, and after in the same Covenant a
(109.) Proviso is added, that the Covenantor, for divers good Considerations, may make Leases for Years to his *Sons or Daughters*, or any other of his Blood; yet the Covenantor in such Case cannot make Leases to his Sons, *&c.* much less to any other Person; because the Power to make Leases for Years was *void when the Indenture was sealed and delivered; for the Covenant upon such general Consideration cannot raise an Use; and no particular Averment can be made, because his Intent was as general as the Consideration was; and his Intent at the Time of the Delivery of the Deed was not to make a Lease to any Person in certain, but a Demise generally to whom he pleased*; and therefore the Power to make Leases, the Uses being created and raised by Covenant upon the Consideration aforesaid, were void *ab initio*; and no Averment can make it good, or reduce it to any Certainty, for the Intent of the Covenantor is as general as the Words are. 1 *Rep.* 176. *b.* As to the second Point, *viz.* Whether there appears sufficient Matter upon the Face of the Deed to raise a Use to *William Thornton*, he argued, a good Use would arise to *William Thornton. If a Man covenants for divers good Causes and Considerations to stand seised to the Use of* John a Stiles, *tho'* J. S. *is not mentioned to be of his Blood, yet the Relation he bears to the Covenantor may be averred*;

averred; in this Case there is no Question but if William Thornton *had been mentioned to be the Sister's Son, but then a good Use would have arisen to him upon that Covenant; and the Consideration of Love,* &c. *might have been averred, as is adjudged in* Mildmay's *Case,* 1 Rep. 176. *b.* 177. *a.*

It is the Intent of the Covenantor not only to provide for his Wife, but his Intent is likewise to provide for *William Thornton* who was his Sister's Son; if Love and Affection to his Wife had been omitted, yet all Uses in Remainder to Relations and the next of Kin had been good; *nor can the Consideration of Love,* &c. *to his Wife, mentioned and expressed in the first Limitation, destroy these subsequent Uses; for a Consideration, when it is not inconsistent with the Deed, may be averred; tho' a Consideration be expresly mentioned in the first Limitation; and so is* Bedell's *Case,* 7. Rep. 40. Harpur's *Case,* 11 *Rep.* 24. *b.* 25. *a.* where it is also resolved, that altho' *she be not mentioned to be his wife, yet an Averment may be made to that Purpose; so if a man covenants to stand seised to the Use of* J. B. *without mentioning him particularly to be his Son, yet* J. B. *may be averred to be his Son.*

Mr. *F.* cont': *He agreed that the two Points were the proper Points in Question; in this Case, the Power which is given to the Feme of limiting over,* &c. *depends upon the first Consideration, and the Uses which fall within that Consideration will be good; the Reason of* Mildmay's *Case is, because the Uses arising from the Power reserved to the Covenantor do not fall within* (110.)

within the Consideration mentioned in the Covenant; it is admitted, that if the Estate had been limited to *Anne* in Fee, that in that Case the Lease and Release to her Sister *Jane Smallpiece* would have been good; the Limitation, as it now stands, falls strongly within that Reason, only the method in which it is now limited is more advantagious to her than if it had been actually limited in Fee; for as it now stands, *if she had remarried with another Husband, she might notwithstanding her Coverture have disposed of it by Will or otherwise to her own Relations.* Here is an express Power given to *Anne* upon Consideration of Love and Affection; which Power she hath put in Execution by making a Lease and Release to *Jane Smallpiece*, who does not claim as by a Conveyance from *Anne*, but is in by Virtue of the first Covenant; *if a Man, in Consideration of Money given by* B. *covenants to stand seised to the Use of* B. *for Life, Remainder to* C. *in Fee, the Remainder to* C. *is good; and yet he is a Stranger to the Gift of the Money.* 2 Roll. Abr. 784. *pl.* 6 & 7. *But the Remainder is grounded upon the Consideration; and yet the Conveyance in that Case did not operate by Way of Bargain and Sale, but by Way of Covenants to stand seised, and the Power of limiting over; this Case is grounded upon that Consideration.* Note: *Since the Statute, where a Person covenants to stand seised in Consideration of Money, after the Covenant is inrolled it operates by Way of Bargain and Sale; and yet it doe not take its Effect from the Inrolment, but from the first Covenants.* In the Case of *Thomlinson* and *Dighton*,

Dighton, the Testator devised Lands to one for Life, with a Power to the Devisee to limit the Estate over in Fee; and adjudged, that where a Person takes an express Estate for Life, he cannot take a greater Estate by Implication; but nevertheless the Devisee may dispose of the Estate according to the Power given him by the Testator; which Determination falls within the Reason of this Case. And yet in that Case, had the Power been general, without giving an express Estate, a Fee would have passed. 1 *Salk.* 239.

As to the second Point, *viz.* whether there appeared sufficient Consideration to raise a Use to *William Thornton*, he held there did not; for the Consideration must be such a Consideration as the Testator had in View; *if a man Covenants to stand seised without mentioning any Consideration, there can be no Averment of a Consideration*; in *Mildmay's Case, where Love and Affection is expressed, the Person to whom the Use is made may aver in what Degree he stands related; as that he is Son, Brother*, &c. *so if the Covenant be general with* (111.) *Consideration, and the Person and the Relation he bears the Covenantor be shewed, the Consideration may be averred*; but in this Case there is no Consideration, nor does it appear in what Degree *William Thornton* stands related to the Covenantor; and so a *Difference between this and* Mildmay's *Case*, and therefore cannot be aided by Averment. *The Statute of Frauds makes this Case much stronger*; for by that Statute, *all Declarations and Uses of Trusts*, &c. *are made void, unless proved by*

some

some Writing signed by the Party, or by his Last Will in Writing; now here appears nothing in this Writing to raise a Use; for altho' Uses are declared, yet if there does not appear sufficient Matter to create them, the Declaration is made void by that Statute; *for since the Statute, no Use can be averred by Parol, but must be reduced into Writing*, &c. He urged further, that the Consideration is not sufficiently found in this Case, which is now to be considered in the Nature of a *Special Verdict*; it ought to have been found certain, that the Use arises upon Consideration of Love and Affection; *for in Pleading, it is not sufficient to alledge he is Son*, &c. *without averring the Consideration*; *for upon Issue joined nothing can be found upon Verdict, but that he is Son*, &c. so that if no Consideration be found, none can be inferred afterwards to raise the Use.

Mr. *R.*'s Reply: *The Case of* Knight *and* Tomlinson *is a Case in Point, so far as it manifests that* Anne *took an Estate for Life.* It is expresly laid down in *Bedel*'s Case that an *Averment may be made that is consistent with the Deed, provided the Person is certain*; *and that this Averment is traversable and issuable appears in* Mildmay's *Case*, 1 Rep. 176. *b.* In the present Case the Person is certain, *viz.* to *William Thornton*; and had he been mentioned in the Deed as Sister's Son, without Doubt that had been a good Consideration to have raised a Use. *The Statute of Frauds doth not extend to this Case*; the Limitation is here by Deed, *&c.* and the Averment is only to make

make and explain the Consideration available; but it does not extend to create the Uses, but is only to make the Consideration sufficient to support the Uses which are declared by the Covenants to stand seised, and reduced into Writing according to the Statute.

Raymond C. J. *Under whom does* Jane Smallpiece, *to whom the Lease and Release was made, claim, and how does that Conveyance to her operate? It arises out of the Estate limited by the Husband, and she being a Stranger in Blood to him, and there having been no Consideration of Money made to him, the Lease and Release is void*; for she does not claim by that only, but by Virtue of the *first Covenant*; Averments in these Cases are not altered by the Statute, nor does the Act extend to them. The Intent of the Covenant is plain; *but the Question in this Case is, how the Use will arise, and whether the Consideration is made good by Averment.* (112.)

P. J. No Part of the Consideration can extend to the Lessor; for *natural Love and Affection to the Wife cannot be extended to the Nephew*; neither can the Intent of the Covenantor make the Uses good, for there must be a Consideration, or the Limitation is void; and the Intent can go no further than appears upon the naked Limitation of the Uses themselves.

P. J. *This Case will deserve Consideration.* If *Jane Smallpiece* hath any Estate, she must claim it from the Covenantor. But she can claim no Estate from him, because there is neither Privity in Blood, nor Consideration in

Money; and *in all Covenants to stand seised there must be a Consideration, or the Limitation is void.* When a Consideration is once expressed, it will extend to all to whom a Use is limited; *provided the Persons are certain, and mentioned by Name within the Deed. The finding helps the Plaintiff in this Case; he is found to be the Sister's Son, which is as strong as if he had been so named in the Deed.*

L. J. The Defendant can have no Title in this Case; for the Person who conveyed to her had but an Estate for Life, and no Fee; if therefore the Defendant hath any Title, it must arise out of the Estate of the first Covenantor; but it cannot arise out of his Estate, because no Privity in Blood, nor other valuable Consideration. As to the second Point, there arises some Difficulty, tho' upon the Equity of those Cases which have been cited, the Plaintiff seems to have good Title. *Wherever in a Deed the Considerations are general, an Averment which is consistent with the Deed may be made; so where the Consideration is particular, as if a Man covenants out of Love,* &c. *to his eldest Son to stand seised,* &c. *Remainder to his second Son, notwithstanding the Consideration is particular, and restrained to the eldest Son, yet it may be extended to an Averment to relate to the second Son;* but there he is expressed to be his Son, which is an Explanation of the Consideration upon which the first Use arises. In this Case, here is no Explanation, and yet he said he was inclinable to think it aided by the Averment. *The Statute of Frauds is not in Question,* nor of any Force in this Case; for when

when the Use is created by Deed, the Consideration may be averred, as Payment of Money, *&c. Sed adjornatur*, in order for a second Argument.

Upon the second Argument, *Raymond C. J. delivered the Opinion of the Court as follows*, viz. (118.)

That the Remainder to the Wife, with a Power to limit over the Estate to such Person or Persons as she should appoint, was a void Limitation, and consequently her Conveyance to *Anne Smallpiece* by Lease and Release was a void Conveyance, and therefore the *Defendant can have no Title. 2dly*, That the *Remainder to* William Thornton *was good; for here is a* Cestuique Use *named in certain*, and he is found by the *Verdict to be Nephew to the Covenantor*; and according to the Resolutions in 1 *Rep.* 176. *b.* 177, *a. Mildmay*'s Case. 7 *Rep.* 40. *Bedell*'s Case. 11 *Rep.* 24, 25. *Harpur*'s Case. *The Consideration may in this Case be averred*; and therefore Judgment was given for the Plaintiff *per totam Cur'*.

Gale *ver.* Mottram, Pasch. 6 Geo. II.

B. R. Vide post.

Arbitration Bond.

IN an Action upon an Arbitration Bond the Defendant pleaded no Award. The Plaintiff in his Replication set forth an Award, and assigned a Breach; whereupon the Defendant applied to the Court for further Time, and had a Rule for further Time to plead; the Defendant staid till the Time was expired, and then

Defendant, after further Time given him by the Court to plead, may demur generally.

demurred generally. Mr. *F.* Counsel now moved to set *aside the Demurrer, and that the Plaintiff might have Liberty to sign Judgment; because the Defendant had not pleaded an issuable Plea, as is the usual practice in all Cases where he moves for Time to plead, and it is under these Circumstances only that the Rule is granted*; so is the common Practice in *Cam' Scacc'*; and tho' he could *not produce a Precedent* in this Court, yet the Reason of the Thing is the same; for otherwise the Obtaining the Rule would only be a Trick of the Defendant's to get Time in Order to *delay the Plaintiff's Proceedings*; *for the Defendant may, at any Time before Judgment, waive his Demurrer and plead over.*

P. and the rest of the Justices against the Motion. *There are two Ways of Pleading the General Issue*; *the one when the Plea goes to the Fact, and concludes to the Country*; *the other is by Demurrer, which is an issuable Plea in Law*; we do not indeed in these Cases *allow him to plead a dilatory Plea, as in Abatement*, &c. *but upon Demurrer the Plaintiff may join Issue, and have Judgment upon the Pleadings.* I do not see *how the Defendant could have pleaded a general Plea to the Country*; *for should he rejoin and plead no Breach, that would have been a Departure from his first Plea, and would admit an Award. When the Defendant moves for Time to plead, he does not by that Means waive any other Advantage*; *and so the Motion was denied* per Cur'.

(114.)

Inny

Innys *versus* Sinclear, Pasch. 6 Geo. II.
B. R. Vide Holmes *versus* Mendese.

Bail upon Affidavit.

THE Defendant was arrested, and held to Bail, upon Affidavit made by a third Person, and not by the Plaintiff himself, of a Note which he had seen in the Hands of a Notary Publick at Hamborough, *whereby the Defendant promised,* &c. *to pay the Plaintiff,* &c. Mr. *F. moved to discharge the Defendant upon common Bail, because the Affidavit was not sufficient to ascertain the Cause of Action.*

Mr. *S.* Counsel opposed the Motion, and offered to supply this Defect by a *supplemental Affidavit.* To which it was answered, that 12 *Geo.* 1. *intitled an Act to prevent frivolous and vexatious Arrests,* makes it necessary for the *Affidavit to be previous to the Arrest,* and so are the express words of the Act; but in this Case it is admitted, that the Affidavit upon which the Arrest was made is insufficient; *it must therefore be thrown out of the Question, and then how will the Matter stand; it will stand thus, that the Defendant was arrested without any Affidavit at all, which is illegal, and contrary to the Act of Parliament, which enacts, that no Person whatsoever shall be arrested and held to special Bail, unless Affidavit be made by the Plaintiff, that his Debt is upwards of* 10 l. *and except the Sum sworn to be indorsed on the Back of the Writ.* On the other Side it was said, that the Plaintiff in this Case had in every Respect complied with the Terms of the Act of Parliament;

liament; *for in the first place, here is an Affidavit of the Debt made before the proper Officer, and the Sum sworn to is indorsed on the Back of the Writ;* by which it sufficiently appears, that the Cause of Action is such as will hold the Defendant to *special Bail*; and tho' it is not entered so regularly as perhaps it might have been, yet certainly the Plaintiff is now at Liberty to supply the Defect by a *more perfect Affidavit*; and in this last *Affidavit, the Cause of Action is sworn to, and the Defendant's Acknowledgment of the Debt;* and the Case of *Hobhouse* and *Hansell, Pasch.* 4 *Geo.* 2. which
(115.) was to this Effect; *Plaintiff made Affidavit before the proper Officer, that the Defendant was indebted to him in the Sum of* 40 l. *but did not swear to the Cause of Action at that Time, but afterwards, before the Purchasing the Writ, he made a fresh Affidavit of the Cause of Action; which was held good, because both Affidavits were before the Issuing of the Process.* In the original Case the Court being divided, *adjornatur.*

Gambier *ver.* Wright, Pasch. 6 Geo. II.

B. R. Vide post.

Error. Escape.

WRIT *of Error out of the Common Pleas in an Action of Debt upon an Escape;* the Case was this: *J. S. was taken upon a* Latitat *issuing out of this Court at the Suit of* Wright, *and committed to the Custody of the Marshal of the Court of King's Bench, and was afterwards brought by* Habeas Corpus *before* Denton *J. of the*

the Common Pleas, who committed him to the Custody of the Warden of the Fleet, from whence he made his Escape; whereupon Wright brought his Action against Gambier *the Plaintiff in Error, and had Judgment. H.* Serjeant took two Exceptions; his first Objection was, that the Commitment to the Fleet was void; because it does not appear, that at the Time of bringing the *Habeas Corpus* there was *any Process out of* C. B. *against* J. S. and therefore the Commitment was illegal, and no Breach of Duty in the Warden to let him go at large; for the Commitment being insufficient, he was never legally in his Custody; and his being in the Warden's Custody does not make him a legal Prisoner. *The Plaintiff in his Declaration sets forth, that* J. S. *was in Custody of the Marshal upon a* Latitat *issuing out of this Court; that he was removed by* Habeas Corpus, *and committed by* Denton *one of the Judges of the Common Pleas, to the Fleet; but does not alledge any Process in that Court returnable against him.*

The Question therefore will be, *Whether a Jurisdiction is to be intended, where nothing appears upon the Record?* He said, he not did doubt but that there was Process at that Time against him, (the Defendant) but the Objection is, *that nothing of this appears upon Record*; and therefore the Commitment must be taken to be *Coram non judice*; *for the Jurisdiction of Inferior Courts is not to be intended.* Whenever a Man is brought into this Court by Bill, the Plaintiff always declares *in Custod' Maresch'*; so if the Process be by Original, the Declaration always sets forth *quod summonitus fuit ad respondendum.*

dendum. In like Manner, where an Attorney
(116.) sues out a Writ of *Privilege*, it always appears upon the Process *that he is an Attorney*; and this is the constant Method of proceeding in *C. B. If the Defendant was committed in* C. B. *without any Process, the Commitment is void.* 1 Rol. Rep. 217. *Hildersham's* Case, *Cro. El.* 223. *pl.* 4. *Lutw.* 1468. *Moore* 274. 2 *Leon.* 84. 2 *Bulst.* 62. *Cro. El.* 877. *Cro. Jac.* 394. 1 *Rol. Rep.* 276. *So where the Process is out of Court, an Action of Escape will not lie. Salk.* 273, 700. *Shirley* and *Wright; and in* 4 & 5 W. & M. c. 21, *it is said, if any Defendant be charged in Custody by Virtue of any Writ or Writs*; but in this Case it does not appear there was any Writ depending; it is only said, he was imprisoned *virtute commissionis prædict'*; which is not sufficient without Process against him out of that Court. His second Objection was, That this Commitment is void in Point of Form; for the Commitment is not as usual to the Prison of the Fleet, *but to the Custody of the Warden of the Fleet*, which is ill; *for the Commitments in* C. B. *are not personal to the Warden, but local*, Prisonæ *of the Fleet*; and the Form of every Court is the Law of that Court, and must be followed.

To these Objections Mr. *D.* answered, That by the *Habeas Corpus Act every Judge hath the same Jurisdiction as the Court it self; it is a general Rule in Law, that all Superior Courts have an universal Jurisdiction, and the contrary shall never be presumed, unless it appears upon the Face of the Record.* The Plaintiff in this Case has set forth as much as fell *within his*

his Privity; he says, *J. S.* was in Custody, *&c.* that he was removed by *Habeas Corpus* and committed, charged *inter alia, &c.* The Plaintiff is a Stranger to his Commitment to the Fleet, *and not necessary for him to set out more than his own Case; as in an Action against Assignees, he is supposed to know his own Title, but not his Adversary's.* There is not so much as one single Instance produced, which shews the Form of declaring in those Cases to be in the Manner contended for, *and the Truth is, there is not one Case in all our Books where any Averment is made of the Process*, &c. *but there are many Precedents which shew the contrary, as in* Lev. Ent. 56. *vide* 2 *Brown's Entr.* 13 & 14. *Rob. Entr.* 307. *Lil. Entr.* 157, 188. As to the second Objection he said, There is no Difference between a Commitment to the Custody of the Warden of the Fleet & *Prisonæ* of the Fleet, *they are the same Thing in Reason and common Parlance*; for when a Man is committed to the Prison of the Fleet, he is committed to the Custody of the Warden of the Fleet, and so *è contra*. This way of declaring is said to be contrary to Form, and that the Precedents are all otherwise; but if it be the same in the Substance, the Difference in Expression will not vitiate it; and in *Lil. Entr.* 161. A Commitment is entered as this is; so in *Rob. Entr.* 302. A Person may be committed to the *Marshalsea* Prison, notwithstanding the usual Form of Commitments, it is to the Custody of the Marshal; and in the late Act of Parliament for Relief of insolvent Debtors, it is said, *a Person committed to the Custody of the Warden*

(117.)

Warden, which plainly shews it to be the same Thing as a Commitment *Prisonæ* of the Fleet. But admitting the Form of this Commitment to be irregular, it is only erroneous, but not in itself void; for the Court had a Jurisdiction originally. 1 *Salk.* 272, 348. 5 *Mod.* 19. *Carth.* 148. *And so concluded, that should this be taken to be a Defect in the Form of a Commitment, the Plaintiff shall not take Advantage of the Error upon an Escape, but shall be liable notwithstanding*; quod fuit concessum per Cur' *to be an established Rule.* And as to the Form of the Commitment the Court held it good; and tho' a Commitment to the Prison of the Fleet may in some Respects be *said to be local*, yet it is not so to all Intents and Purposes; *for suppose a Prisoner escapes, and afterwards the Warden resigns his Office, shall the new Warden be answerable for this Escape? he certainly shall not.* And the Court seemed to think it *not necessary for the Plaintiff in this Action to shew there was any Writ in* C. B. *against* J. S. *for it shall not be intended to the contrary.* Sed adjornatur, to be spoke to again.

King *versus* Inhabitants of *Utoxeter*, Pasch. 6 Geo. II. *B. R.*

Certiorari *lies not to return a Poor's Rate.*

THE Court after great Deliberation resolved, that a *Certiorari did not lie to remove a Poor's Rate; that if the Rate be not a legal Rate, or if it be unequal, the Party aggrieved may there appeal to the Sessions for his Remedy upon the Distress*; and so it was determined 10 *Anne*,

Anne, in the Case of St. Mary's *in* Marlborough. A Rule was made to return the Poor's Rate, but was afterwards quashed.

Hays *versus* Warren, Pasch. 6 Geo. II. *B. R.*

Error. Case on Assumpsit *for Work and Labour, not laid to be done* ex Requisitione Defendentis. (118.)

ACTION *upon the Case upon several Promises for Work and Labour done. Judgment by Default; the Defendant brought a Writ of Error, and assigned general Errors.* Mr. *H.* Counsel *objected, that the Plaintiff did not appear to have any Cause of Action.* This is an action for Work and Labour done; there are several Counts in the Declaration, and it is *not alledged in any one of them that this work was done* ex Requisitione *of the Defendant*; this Action is grounded upon a *past Consideration*, the Plaintiff sets forth *cumq' etiam* the Defendant in Consideration that the Plaintiff *performâsset & perfecisset, &c.* he promised, *&c.* This is in the Preterperfect Tense, and is for a Consideration passed, and therefore *ought to have been coupled with a Request.* 1 Rol. Abr. 11. *This is not Want of Form only, it is a Defect in Substance, and would not have been helped by the Statute of Jeofails, if a Verdict had been given in this Case.* Cro. Eliz. 442. Jeremy *and* Goochman. *Assumpsit,* and declares, that in Consideration *quod deliberâsset & dedisset* to the Defendant twenty Sheep, he assumed to pay unto him 5 *l.* at the Time of his Marriage; and alledged *in facto* that he was married; the Issue

Issue was *Non assumpsit*, and found for the Plaintiff; and *moved in Arrest of Judgment, because it was for a past Consideration; for it is in the Preter-Tense* deliberâsset, &c. *and therefore no Cause of Action*; and of that Opinion was the whole Court, and therefore *Judgment staid.* So *Cro. Eliz.* 741. *Barker* and *Halifax*; *Assumpsit*, whereas the Defendant such a Day and Year, in Consideration that the Plaintiff by the Defendant's Appointment, and for his Debt, *paulo ante tunc solvisset* to *R. S.* 60 *l.* that the Defendant assumed to pay it upon Request, *&c.* the Defendant pleaded *Non assumpsit*; and it was found against him; and after Verdict, upon Motion in *Arrest of Judgment, the Judgment was staid; because the Payment of the* 60 l. *being a past Consideration, was not sufficient to maintain the Action. But* Note; *The Court seemed to think these Cases were not Law, because here was a good Consideration, and the Defendant has reaped the benefit of it.* In 3 *Leon.* 91. *Merry* and *Lewes*, which Cases are cited 2 *Vent.* 75. in Consideration he would repair a House at the Defendant's Request, he promised to pay, and alledged that he repaired it; and this was held naught after Verdict, for not saying he repaired *it at Request.* And so it was adjudged *Pasch.* 11 *Ann. Powel* and *Coke* Infant. *No* Assumpsit *will lie upon a past Consideration, unless there be a Request which couples it to the Promise*, where it is laid in the Declaration that the Defendant *inde* stood indebted, *&c. A Request may not be necessary, because it is alledged to be a Debt, and it continues to be a Debt till it is discharged*

discharged. So where it is alledged, that the Defendant in Consideration the Plaintiff had bargained and sold, *&c.* in this Case the Plaintiff *need not aver a Request, because a Bargain and sale implies as much;* it is *Actus contra actum*, which couples the Request to the Consideration; but an *Assumpsit* for Work and Labour done, as it is laid in this Case, *viz*, quod performâsset & perfecisset, *cannot imply a Request, because it might be done without the Knowledge or Privity of the Defendant; and therefore an Action will not lie, unless it be expresly averred to have been done* ex Requisitione *of the Defendant.* (119.)

Mr. *S.* Counsel *cont':* He agreed, that in the old Books it was held, that a Request was necessary, but that these Niceties in Pleading had introduced great Inconveniences, and for that Reason the Law was now altered. *The Cases that have been cited out of* Cro. Eliz. *cannot be held for Law at this Day*; in *fol.* 442. it is said there was no Request, but it is alledged *quod deliberâsset*, which implies a Request; for he could not have delivered it to the Defendant, unless there had been an Acceptance, and that necessarily imports a Request and Privity in the Defendant; and in *fol.* 741. it is alledged to be at the Defendant's Appointment; which can be taken no otherwise, than at the Request of the Defendant he had done so and so. The Case in 3 *Leon.* 91. he agreed to be good Law, but that was for Work and Labour done *for a third Person, and therefore the Defendant could not be liable unless it was done at his Request*; but in the present

present Case it is said, *quod performâsset & perfecissit pro eodem Carolo*, which distinguishes it from the Case in *Leon.* the Reason of this Case is against them. It is objected, that there does not not appear any previous Request; *but it appears the Defendant had the benefit of the Work and Labour, which is the same Thing, and equal to a Request.* In *Raymond* 260. the Case of *Church* and *Church*, where in *Assumpsit* the Plaintiff declared, that whereas the Plaintiff had at his own Charge buried the Defendant's Child, the Defendant promised to pay him his Charges; and tho' there was no Request laid; yet Judgment was given for the Plaintiff. So in *Hutt.* 84. *Franklin* and *Bradell*; *Assumpsit*, That whereas the Plaintiff had served the Defendant & *Ux'*, the Defendant after the Death of the Wife promised to pay, *&c.* it was moved in Arrest of Judgment, that it was a past Consideration, and there was no Request alledged; but adjudged it was *a good Consideration, and that the Service was to the Benefit of the Defendant*; and therefore that in Consideration that the Plaintiff had married the Daughter of the Defendant is a good Consideration; so in Consideration that you have been my Surety, I promise to save you harmless; so in Consideration that the Plaintiff was Bail for the Defendant, he promised to give him a Horse, this is good; so in Consideration
(120.) that *J. S.* being a Carpenter had well built my House, I promise to give him 5 *l.* *And it is not necessary in any of these Cases to alledge a Request*; *because the Benefit which the Defendant receives is a good Consideration, and necessarily*

sarily implies a Request; and to this Purpose was cited likewise 2 *Leon.* 111. *Marsh* and *Rainsford*, and 2 *Leon.* 225. He further argued, that if the Court should be of Opinion that a Request was necessary, that there was sufficient Matter alledged in the Declaration to import a Request; it is said, that whereas he had done such Work that the Defendant *inde* promised to pay, *&c.* so that the Promise is laid to be on the same Day that the Work was performed; and therefore may be taken to be a Promise before the Consideration was past, *scil. before the Performance of the Work, for the Law makes no Fraction of Days.* Latch. 150. 1. *Rol. Abr.* 12. *pl.* 13. And if it be taken this Way, a Request is not necessary. It is likewise alledged, to be for Work done *pro eodem Carolo*, and that is as much as to say, *that it was Work done at the Request of the same Charles*; it is laid in the *Quantum meruit*, that he deserved so much Money from the Defendant, and he could not deserve so much, unless the Defendant lay under an Obligation to pay it. *Latch* 112, 274.

Raymond C. J. *Where the Facts are so stated upon the Face of the Declaration, that it appears that the Defendant had the Benefit of them, an Action will lie, if the Consideration arises upon a mutual Agreement; as if it be alledged, that whereas the Plaintiff* Vendidisset, &c. *the Defendant promised; this imports a Consideration and a Request, for the* Vendidisset *takes in the Concurrence of both Parties:* But in the principal Case, *it is neither said to be at the Request of the Defendant, nor does it appear that he*

he reaped any Benefit by it afterwards. This Action is grounded upon a Promise made for a past Consideration, it is alledged on such a Day he did the Work, and *postea* the Defendant promised to pay. *In some Cases the Law does not allow of any Fraction of Days, in other Cases it will*; but in this Case it is evident the Consideration was past. If a Man should come and say he built a House for me, and it does not appear that I had the Advantage of it, an Action will not lie. In all those Cases where the Action is held good, notwithstanding the Omission of a previous Request, *it appears the Defendant had a Benefit, which by Implication carries a Request along with it. The Statute of Jeofails does not extend to this Case; here wants Substance, and nothing is cured by those Statutes but Defects in Form only.*

P. P. and *L.* Justices were all of the same Opinion, that the *Judgment should be reversed*; (121.) for that there appears nothing thro' the whole Declaration but a bare Averment, that the Plaintiff had done so much Work, without alledging any *Request previous to the Consideration, or any Benefit subsequent*; and there is not one Case wherein the Action hath been held maintainable, but there is an express Request set forth in the Declaration, or something else, wherein it may be inferred the Defendant had received a Benefit. Work may be done for a Man without his Request or Privity; if a man will enter upon my Land, will pull down my House and build up a new one, without my Consent and Approbation, the

the Law gives me the House; and the Plaintiff hath no Remedy for Work and Labour done; the old House might be as commodious for me to live in, as a new one; and an Action will not lie, unless the Consideration is grounded upon a precedent Request, or a subsequent Benefit and Approbation. In the Case of Bail, can a Man come afterwards and say he reapt no Advantage from it; it appears clearly he had a Benefit; so for Charges in burying another Man's Child; and in all the other Cases there is a Benefit arising to the Defendant on a Request alledged in the Declaration. The Statute *of Jeofails does not extend to the present Question*; and so Judgment was reversed *per totam Cur'*. Vide *Hob.* 105. *Lampleigh and Brathwait. Dyer* 272. *Hunt* and *Bate. Dyer* 355. *b. Oneley's* Case. *Cro. Eliz.* 59. *Marsh* and *Kavenford. Cro. El.* 442. *Jeremy* and *Goochman, contra. Cro. El.* 741. *Barker* versus *Halifax, contra.*

Bishop *ver.* Stracey, Pasch. 6 Geo. II. *B. R.*

Action upon the Case. Demurrer.

ACTION upon the Case upon several Promises; and the Plaintiff declared against *the Defendant* in Custodia Domini Regis Mareschalli, &c. The Defendant demurred specially, and assigned for Cause, that the Stile of the Court was ill set out; for as this Case stands, *it does not appear the Defendant is*

before the Court. In all Cases, where the Defendant is sued by Bill in this Court, he is in the Declaration to be *in Custodia Mareschalli Mareschalsiæ Domini Regis, coram ipso Rege existen'*; this is the proper Stile, and it is this which gives the Court a Jurisdiction. The second Cause of Demurrer was, because it was said generally the *Plaintiff came*, &c. and it does not appear in what Manner, whether by Attorney, in proper Person, or by Guardian; and it cannot be intended he comes *in propria Persona*, because it is not said *secundum legem & privilegium hujus Cur'*; there are many Instances where the Pleadings have been held ill, because the Attorney's Name has not been specially mentioned, but only said *quod venit, &c. per Atturnatum suum.* 1 Rol. Abr. 796. pl. 28. So there are Cases where it has not appeared, in what Manner, or by whom the Party appears; as in 1 *Rol. Abr.* 794. 12. it was said *quod defendens venit & comparuit* generally, and this was held to be Error, because it did not appear by the Record, whether in proper Person or by Attorney.

(122.)

Mr. *D.* Counsel *cont'*: There are numerous Precedents in the Books, where the parties may both sue and defend *in propriâ personâ*; and it being altered generally in this Court, it must be intended he came in proper Person. As to the Stile of the Court, there are a great many Acts of Parliament where the Description of the Court is set out in the same Manner, in Custody of the Marshal of the King's Bench; the Description of the Office of

of the Marshal of this Court is not so strictly regular as to admit of no variation or Diminution; for in 2 *Salk.* 439. a *Sci' Fac'* was brought against a Bail, and the Breach assigned was, that the Defendant had not rendered himself *Prisonæ Mareschalli Mareschalsiæ Domini Regis*, omitting the words *coram ipso Rege*; and yet this was held good, notwithstanding it was objected the King had another Marshal, and that is the Marshal of the Household; for the Marshal of the King is the Marshal of the King's Bench, and no Body else can be understood. So in 2 *Salk.* 602. *Sci' Fac'* on a Recognizance of Bail, assigning Breach, that the Defendant did not pay, nor render *Prisonæ Mar' Maresch' nostræ*, without saying any Thing further, and yet it was held good and sufficient; and in the Stat. 8 & 9 *W.* 3. *c.* 6. it is called the Marshal of the *Marshalsea* of the King, without saying *ipso Rege*.

Cur': Both the Objections seem to be strong ones; for altho' in Common Parlance an Office may be so described as to be understood, yet in Pleading it must be described in that Manner in which it is taken Notice of in Law; Acts of Parliament do not always so strictly follow the description of Things as is necessary in Pleading. Suppose an Information in the Name of the Marshal of the King's Bench, or should an Action be brought against Mr. *Ventris*, would it be sufficient to declare against him by the Name of the *Master* of the King's Bench? As to the other Objection, they held it was necessary to shew in what

Manner the Plaintiff comes and appears, whether by Attorney, Guardian, or *in propria persona*; and it is not sufficient to say generally he comes and appears, for that cannot be intended an Appearance in proper Person. *Sed adjornatur.*

(123.) *Pasch.* 8 *Geo.* 2. *Trueby* versus *Baker.* Error upon a Judgment in *C. B.* and the same Objection was taken by *Burrel*, that it did not appear in what Manner the Plaintiff sued, whether by Attorney or in proper Person.

Weal *versus* Smith, Pasch. 6 Geo. II. *B. R. Vide post.*

Judgment, and Writ of Error.

THE Plaintiff had Judgment, and before Execution a Writ of Error *coram vobis*, *&c.* was brought, pending which the Plaintiff sued out a *Fi' Fa'* by the Name of *Neal*, by Virtue of which Writ the Defendant's Goods were taken in Execution; but the Plaintiff afterwards finding out his Mistake, sued a second *Fi' Fa'* before the Day on which the first was returnable; and by Virtue of this second Writ the Sheriff continued in Possession of the Defendant's Goods; whereupon the Defendant moved to set aside Execution, and to have his Goods restored; and took two Exceptions, 1*st*, *That the Plaintiff could not sue out Execution pending the Writ* coram vobis; *and* 2*dly*, That the first *Fi' Fa'* being wrong, the Sheriff could not detain the Goods in Execution. As to the first Objection it

was

was answered, *that Error* coram vobis *was no* Superfedeas, *unless Bail be put in*; and in all Cases where this Writ has been allowed, (for it is but a modern Innovation in the Law,) Bail has been put in; and so it was in the Case of *Jones* versus *Palmer*, 13 *Geo.* 1. before *Raymond* C. J. it was said, there was no Cases directly in Point, tho' there are Cases which seem to intend as much; as in 1 *Vent.* 207. and *Lil. Pract. Reg.* 1 *Vol. fol.* 528. And Writs of Error are not to be favoured, because in Delay of Justice, which occasioned the making the Statute of 3 *Jac.* 1.

Mr. *F.* Counsel *cont'*: There is a Case in 3 *Bulst.* 62. which is in Point; for it is there said by *Coke C. J. that in taking Bail upon a Writ of Error, this Rule is to be observed; if the Error assigned be Matter in Law, then the Use is to take Bail of the Party; but if the Error be upon Matter in Fact, then the Use is not to take Bail before this Matter of Fact be tried*; and so is the Difference. This comes up exactly to the Case in Question; *for Error* coram vobis *goes to Matter of Fact only*, and cannot be assigned for Matter in Law; *for the Court is supposed to have determined that upon the Record before*; *a Writ of Error is a Writ of Right*, and the Statute has always been construed strictly; for it has always been held *not* (124.)
to extend to Executors or Administrators; and yet they are *within the Meaning of the Statute*, tho' not within the Words of it; *and yet if Executors will come voluntarily and put in Bail, they cannot afterwards waive it*; *and the Case*

of

of Jones *and* Palmer was no more, the Plaintiff went and voluntarily put in Bail.

Cur': This Writ is discretionary, and is not a Writ of Right *ex debito Justitiæ*; and therefore, when it is allowed by the Court, they may put what Terms they please upon it; *but doubted whether Bail was absolutely necessary.*

L. J. seemed to be of Opinion, that *Bail was necessary*, and cited the Case of *Walker* and *Stokoe*, *Carth.* 367. where it is so held; so where a Writ of Error abates by the Death of a Party, *the second Writ is no* Supersedeas *without Bail*; and was so held in the Case of *Butler* and *Lucitans*, 4 *Geo.* 2. which seems to be of the same Nature with *Error coram vobis*; he cited likewise the Case of 1 *Vent.* 31. 1 *Mod.* 285. As to the second Objection, Serjeant *Eyres* said there was no Pretence of any Fraud in this Case, the Judgment is legal, and for a fair and honest Debt; the Complaint is, that there was a Mistake in the first *Fi' Fa'*, and that is admitted; it was the Mistake of the Clerk, and as soon as the Plaintiff was aware of it, he took out a fresh *Fi' Fa'*, and it is by Virtue of this second Writ, (which is a good Writ,) that the Goods are held in Execution. The first *Fi' Fa'* was void, and is to be considered as if no Writ had issued at all; *and the Defendant may have his Remedy by Action against the Plaintiff for taking his Goods tortiously, but that will not make the second* Fi' Fa' *void.* We are now legally in Possession of the Goods, and therefore Execution ought not to be set aside.

Mr. *F. cont'*: It is admitted that the first Execution

Execution is bad, when therefore that is set aside, all subsequent Process served upon the Defendant under that Execution fails likewise. *As where a Man is arrested in a wrong County, and during his Arrest is served with fresh Process, when he comes to discharge himself of the Arrest, every Thing that was served upon him under the Arrest is discharged likewise.* So where Goods are taken wrongfully, they cannot afterwards be charged legally under that tortious Execution. *P.* J. The Mistake in the first *Fi' Fa'* appears to be nothing but the Misprision of the Clerk; here is a good and legal Judgment, and the Plaintiff is intitled to his Execution; but in taking out a *Fi' Fa'* the Clerk by Negligence has put an *N* instead of a *W*, but the Plaintiff, as soon as ever he found out his Mistake, took out a new *Fi' Fa'*, and that was before the first was returnable; and there is no Pretence of a Fraud or Trick in the Plaintiff to charge the Defendant's Goods wrongfully. *P.* J. The Execution in (125.) this Case is originally void; and the Plaintiff cannot come and by a subsequent Act supply the Defect of that Execution; the Goods were wrongfully taken, and therefore the Detaining them must be wrong also, and every subsequent Charge upon them is void; *and this is a constant Rule in all mesne Process, if the original Process fails, all that has been done subsequent thereupon must fail likewise.* Had the Goods been once restored, the second Execution by Virtue of the last *Fi' Fa'* had undoubtedly been good; but in this there was no Restitution, but all that was done, was during the Continuance

Continuance of the first Tort. *L.* J. was of the same Opinion with *P.* he thought there must be some *Evidence of a tortious Act, before this Execution could be set aside.* But the Court gave no absolute Opinion, but took Time to consider upon both Points.

Poulter *versus* Greenhall, High Sheriff of the County of *Lancashire*, Pasch. 6 Geo. II. *C. B.*

Prisoners assignable over by Parol.

PRisoners may be assigned over by Parol to succeeding Sheriffs, notwithstanding the Writ in the Register is by Deed. Vide 2 *Rol. Rep.* 146. *Dalton's Office of Sher.* 3 *Rep.* 72. *Wesby's* Case. 1 *Sid.* 335. Hanmer *versus* Winmer. *But the new Sheriff may compel the old Sheriff to make an Assignment by Indenture.*

The King *ver.* Cotten, Trin. 6. Geo. II. *B. R. Vide antea.*

Information for convicting a Man of being the reputed Father of a Bastard-Child, without Warrant or Summons.

FOR an Information against the Defendant, for convicting and charging a Man as the reputed Father of a Bastard-Child, without either Warrant or Summons; and cited the Case of the King *and* Allington *ab Venables*, 12 *Geo.* 1. Conviction by the Mayor of *Hartford*, for selling Ale without a Licence, and upon Affidavit that the Defendant was convicted without any Summons, *an Information was granted*; and

and so was the Case of the *King* and *Heber*, *Pasch.* 5 *Geo.* 2. (2 Barn. 77, 101) which was a Conviction upon the Game Act; and so in the Case of the *King* and *Clogg*, and the *King* and *Holland* (1 Sess. Ca. 172), being both Orders of Bastardy, *Information was granted because no Summons.*

B. and *C.* Serjeants *cont'*: They endeavoured to distinguish this Case from the Case of a Conviction; and said this was only an *Adjudication*, and not *an absolute Conviction*; *for by* 18 *Eliz.* the Sessions have *an original Jurisdiction, and an Appeal lies.* Suppose the Justices had made no Order at all, but only bound over the Party to appear at the next Sessions; this certainly would have been no Conviction; and the present Order may be considered in the same Light. *It may be compared to the Case of an Indictment, which is always found against the Defendant, without any Notice, and cited the Case of the* King *and* Backwell, Mich. 4 Geo. 1. *The Defendant moved to have a Conviction of Bastardy set aside, because it did not appear there was any Summons; but the Court denied the Motion.* They then argued from the Inconvenience that would arise, should a Summons be held necessary; *for by this Means the Party would have an Opportunity to run away and escape.* (126)

The Court agreed, that to convict a Man without a Summons, or giving him an Opportunity to make his Defence, was against natural Justice. That it was an Excess of Power usurp'd by the Justices, and that by this Means the Defendant had been greatly injured; had not only

only been deprived of his Liberty, but that it was a great Scandal and Reflection upon him. The Words of the Act of Parliament in this Case are very strong, *viz. That the Justices upon rightly and duly examining into the matter may, &c.* Can the Matter be said to be rightly examined into, when *one Side only is heard?* This is undoubtedly an irregular Proceeding in the Justices; but whether it was to be considered as such an Abuse of Power, as to *draw down the Censure of this Court in so* extraordinary a Manner, *was the Question.* There does not appear to be Prejudice or Oppression to the Defendant in this Case; and when nothing of this appears, the Court ought to be cautious in its Proceedings against *Justices of the Peace, who serve their Country without Profit or Reward.* The Defendant is not without Remedy; if he has received any Injury, *he may have an Action of false Imprisonment; and therefore refused to grant the Information.*

L. J. said, had this been a Conviction, the Summons ought to have appeared *upon the Face of it*, or the Court would not intend it; otherwise in the Case of an Order; for then the Court will presume a Summons till the contrary appear; he said, he was inclinable to think this was *not a Conviction; and that this Distinction was taken in the Case of Bastardy afore cited.* By 3 *Car.* 1. *Sessions have an original Jurisdiction.*

Gale

Gale *ver.* Mottram, Trin. 6 Geo. II. (127.)
B. R. Vide antea.

Debt upon an Arbitration Bond.

DEBT *upon a Bond conditioned to submit to an Award; the Defendant craved Oyer, and pleaded no Award.* Plaintiff rejoins, *that after the Submission both Parties entered into Articles to account; and upon an Account fairly stated, the Defendant appeared to be indebted to the Plaintiff in the Sum of* 400 l. *and therefore the Arbitrators awarded, that the Defendant should pay that Sum to the Plaintiff's Agent; and assigned for Breach that the Defendant had not paid,* &c. *And upon Demurrer Exception was taken to the Award, because this Money was ordered to be paid to a third Person, and not to the Plaintiff himself; and cited* 1 Rol. Abr. 243. pl. 6. 247. pl. 4. Cro. Eliz. 4. Godbolt 12. and the Case of *Lane* and *Tanner*, *Pasch.* 12 *Anne*, where it was awarded, that the Defendant should deliver to the Plaintiff certain Lands in Possession of a third Person, *&c.* and it was held that the Award was ill; for the Defendant had not a Power over the Land, and consequently could not deliver it up without being a Trespasser.

Mr. *F. cont*: This Case differs from the Cases cited; for the Person, to whom the Money was to be paid, was not a Stranger, but Agent for the Plaintiff; and it was his Duty to receive it.

To appoint Money to be paid to *Trustees for the Plaintiff's Use is good*, so it is to be paid to such

ſuch Perſon as the Plaintiff ſhould appoint to receive it; and in theſe Caſes Tender and Refuſal is a good Performance of the Award, and may be pleaded in Bar to any ſubſequent Action, for it is in Effect Payment to the Plaintiff himſelf.

Cur': The Perſon to whom the Money was to be paid is ſaid to be the Plaintiff's Agent, and it is the ſame Thing as if it had been ordered to be paid to the Plaintiff himſelf; and Tender and Refuſal is a good Performance: *Suppoſe it had been ordered to be paid to the Plaintiff's Order, certainly a Tender to the Plaintiff's Order had been good; for Payment to a Man's Order is Payment to himſelf.* The whole Court being of this Opinion, the Defendant deſired Time to look into it; and thereupon Judgment was not given.

(128.) The King *ver.* Ames, Trin. 6 Geo. II. *B. R.*

Order of Seſſions.

TO quaſh an Order of Seſſions, which was made to diſcharge an Apprentice from the Defendant *Ames*, who was a Carpenter by Trade, and that the Defendant ſhould return and pay back 5 *l.* to the Uſe of the Apprentice.

Mr. *S.* Counſel took four Objections. 1*ſt*, That this was not a Trade within the Statute, and ſo the Juſtices have no Juriſdiction. 2*dly*, It does not appear the Defendant received any Money from his Apprentice. 3*dly*,

3dly, The Seſſions have no Power or Authority to order the Maſter to refund; and *4thly*, It does not appear the Maſter was ever ſummoned, or had Notice of the Complaint.

To theſe Objections Mr. *F.* answered. And as to the fourth he ſaid, there was no Occaſion to ſet forth a Summons, for this comes before the Seſſions as a Court of Record, and therefore not neceſſary to ſet forth more than to ſhew they have a Juriſdiction; and the Statute which gives the Seſſions a Juriſdiction, does not make a Summons neceſſary. *Vide* 5 *Eliz. c.* 2. 1, 35. which provides, "That the Maſter or Apprentice having "Cauſe of Complaint ſhall repair to one "Juſtice of Peace, and ſhall take ſuch Order "therein as the Equity of the Caſe ſhall "require; and if he cannot agree the Matter "between the Parties, then he ſhall take "Bond of the Maſter to appear at the next "Seſſions, *&c.*" So that the Maſter is at his own Peril obliged to take Notice and appear; if he does not, the Seſſions may diſcharge the Apprentice in his Abſence; and ſo is *Dillan's* Caſe, 1 *Salk.* 67. and *Ditton's* Caſe, 2 *Salk.* 490. for the Maſter ſhall not take Advantage of his own Obſtinacy. As to the third Objection, he ſaid, as the Juſtices may diſcharge an Apprentice, ſo they may alſo order a Reſtitution of the Money, within the Equity of the Statute. The Juſtices have a Power to raiſe Money in order to put out an Apprentice, by the ſame Reaſon they may have a Power to order Money to be reſtored; and this is a Power conſequential upon their Juriſdiction

to

to discharge. 1 *Salk.* 67, 68. 2 *Salk.* 491. As to the second Objection, he admitted, that it was not said expresly that the Master had received any Money with his Apprentice, but the Words are tantamount, and as strong by Implication as possible. The Words are, "That the Master shall return and pay back," which he could not do, unless he had received. As to the first Objection, he said, that in (129.) *Gately's* Case, 2 *Salk.* 471. it was held, that the Power to discharge Apprentices extends only to such Trades as are specially mentioned in the Statute; but there are other Cases where it is said that Statute is to be taken liberally, and to extend to all Apprentices. 1 *Saund.* 313. 2 *Keb.* 592. But this Case does not fall within the Equity of the Statute, but within the express Words of it; for in the 30th Section, where Mention is made what Trades may take Apprentices, the Trade of a Carpenter is expresly mentioned; and then comes the 35th Section, which gives the Sessions a Jurisdiction, and says, "If any such "Master, *&c.*" which is meerly relative to Trades mentioned in the 30th Section.

Mr. *S.* Counsel *cont'*: It is insisted, "That "if the Master does not appear, that his Non-"appearance does not defeat the Jurisdiction "of Sessions, but they may discharge the Ap-"prentice in his Absence; and in order to "support this Doctrine, Recourse is had to "the Statute, that Application is to be made "originally to a Justice, and that if he cannot "reconcile the Matter, then he is to take a "Bond for the Master's Appearance at the

"next

"next Sessions." And indeed, had the Circumstances of the Case been so in Fact, the Master must have appeared at his Peril; but nothing at all of this appears, and it is well known the Sessions have an original Jurisdiction; he admitted, that upon looking into the Act of Parliament, it looked as if a prior Application to some Justice of Peace was necessary, but it had always been determined otherwise, and the Word (*shall*) is not compulsory, but directory only; and so is the Case of the *King* versus *Johnson*, 1 *Salk.* 68. 2 *Salk.* 491. S. C. It must therefore, as this Case stands, be now taken, that it came originally before the Sessions, and therefore Notice was necessary. The Cases cited by Mr. *F.* make for the Defendant, for by them it appears the Master was summoned; and if after that he will make Default, the Sessions may undoubtedly proceed; and so it was held in the Case of the *King* versus *Sympson* (Gilb. 282), which was upon a Conviction for Deer-stealing. But the Objection in this Case is not that the Master did not appear, but that he was never summoned? It is insisted, that by a strong Implication it does appear Money was given with the Apprentice; but Things are not to be taken by Inference, for there ought to be express Words to shew they have a Jurisdiction. As to the first objection, he waived that, because the Trade of a Carpenter was mentioned within the Statute, or else it had been a strong Objection; as was held in the Case of the *King* versus *Wately*, *Mich.* 12 *Geo.* 1. which was an Order to discharge an Apprentice

(130.) Apprentice from his Master, who was by Trade a Cutler; and the Order was quashed, because not within the Act.

Cur': It does appear that this Cause came originally before the Sessions, and therefore a Summons was necessary; the only Question is, whether it be necessary to set out this Summons in the Order? it is said in the Order, that upon hearing Counsel, but does not say, upon hearing Counsel on both Sides; tho' this seems to be a reasonable Construction, the Distinction that has been taken in these Cases between Orders and Convictions, seem to make a Summons not necessary in this Case; for this which is before us at present is no more than an Order of Sessions, and so a Summons must be intended, unless the contrary appears. The Statute which gives the Sessions a Power to discharge in Consequence thereof, gives a Power to order Restitution, or otherwise the Master would be a Gainer by his own Wrong. By a necessary Intendment it appears, that the Master has received Money with his Apprentice; for the Order is, that he shall refund and pay back, which is tantamount to Words that he shall return and pay back so much Money received. But the Court did not give any absolute Opinion, but took Time to consider.

Martin

Martin *versus* Duckett, Term. Trin. 6 Geo. II. *B. R.*

Error to reverse an Outlawry.

UPON *Error brought to reverse an Outlawry*, Mr. *D.* Counsel moved *to stay Proceedings till the Plaintiff in Error had put in Bail*, as was directed *by the Act of Parliament*; *and cited* Carth. 459. *Stat.* 31 *Eliz. c.* 3. *and* 4 & 5 W. & M. c. 4. But the Motion was *denied* per Cur'; *for the Plaintiff in Error is not obliged to put in Bail till the Outlawry is reversed*; *and the Writ of Error stays nothing before Bail is put in*, but the *Plaintiff may proceed to Execution.* Vide *Stat.* 3 *Jac.* 1. *c.* 8.

Holmes *ver.* Mendese, Trin. 6 Geo. II. *B. R. Vide* Innys *versus* Sinclear. (131.)

Affidavit to hold to Bail, insufficient.

THE like Motion was now made this Term, the Defendant having been arrested upon *Affidavit made by a third Person*, that he had seen the Defendant's Account Books, and by them it appeared the Defendant was indebted to the Plaintiff in the Sum of, *&c.* The Court granted the Motion, and said, this was not so strong a Case as that of *Innys* and *Sinclear*; *where a third Person* made Affidavit he had seen a Note of the Defendant's payable to the Plaintiff in the Hands of a Notary Publick.

Clark *versus* Paget, Trin. 6 Geo. II. *B. R.*

Motion to set aside Proceedings, the Notice under the Writ not being according to the Act of Parliament.

MR. *V.* Counsel moved to set aside all Proceedings, (*the Plaintiff having proceeded so far, that Judgment was to have been signed that Morning, upon which the Motion was made*); and his Objection was, that the Notice under the Writ was not according to Act of Parliament, which has chalked out the express Words in which Notice is to be given, and by that *the Name* of the Defendant is to be set out at the Head of the Notice; whereas in this Case the Defendant's Name was omitted, and only said generally, *You are served*, &c. *Vide the Stat.* 5 Geo. 2. *to prevent frivolous and vexatious Arrests.*

And upon a Rule to shew Cause, Mr. *S.* insisted, that the Meaning and Purport of the Statute was pursued; and that it was not necessary to include the Defendant's Name, where he was personally served; and it was not said that Notice should be in the Words following, 'but to the Effect following, *&c.*'

But the Court granted the Motion; for the Act of Parliament is express, and the Plaintiff must either *strike the Letters A. B.* out of the Act, or insert them in his Notice.

The

The King *versus* the Wife of *Keat*, Trin. 6 Geo. II. *B. R.* (132.)

Libel for Slander or Defamation in the Disjunctive.

THE Defendant was libelled against in the Spiritual Court for Slander or Defamation, and a Writ *de Excommunicato Capiendo* issued against her: which Mr. *K.* Counsel now moved to quash, because the Charge was in the Disjunctive, *viz.* for Slander or Defamation, and cited the Case of the *King* and *Smith*, which was a Libel in the Spiritual Court *pro convitio sive Defamatione*; and the Court in that Case held the Libel naught, because uncertain and in the Disjunctive. But in this Case the Motion was denied, for Slander and Defamation have one and the same Signification; but there is a Difference between *Convitium* and *Defamatio*; for *Convitium* has a double Meaning, and signifies *Reproof as well as Scandal.*

Gregory *ver.* Warren, Trin. 6 Geo. II. *B. R.*

Proceedings against Bail stayed, a Writ of Error being allowed on the Day the last Scire facias *was returnable.*

TO *stay Proceedings against the Bail*; the Writ of Error in the original Judgment being put in and allowed *on the same Day the last* Sci' Fa' *was made returnable.* Mr. *S. cont'*: This is a stronger Case than that of *Miers* and *Arthur*, and in that Case the Court said they would go no further; and yet there the Writ of Error was put in and allowed

two Days before the Return of the first *Sci' Fa'*. But the Court in the original Case made a Rule to stay all Proceedings.

Paschal *versus* Terry, Trin. 6 Geo. II. *B. R.*

An Award set aside being made without giving Notice to or hearing the Defendant.

SUbmission to two Arbitrators, and if they cannot agree, to appoint an Umpire; they accordingly appointed an Umpire, who made his Umpirage the Day following; the Parties being neither summoned, nor having Notice of the Appointment. Mr. *S.* Counsel moved to aside the Umpirage; and objected, that it was unreasonable, and contrary to natural Justice, to make an award without giving Notice to the Parties to attend. This is repugnant to the Submission and is a Misbehaviour within the Act of Parliament; the Umpirage was made upon the Defendant's Evidence alone, *parte alterâ inauditâ*, the Plaintiff was neither heard nor had any Opportunity given him to be heard; and for this Reason it was set aside *per L.* and *P.* Justices, *absente P.*

(133.)

Weal *versus* Smith, 6 Geo. II. *B. R.* *Vide antea.*

Error coram vobis *no* Supersedeas *without Bail.*

L. J. said, *Error* coram vobis *was no* Supersedeas *before Bail is put in*; and cited the Case of *Merryfield* and *Wellon*, 5 *Geo.*

Geo. 2. (1 Barn. 66) where it was so held expresly; and *Raymond* Chief Justice at that Time said it was so determined in the Case of *Ginger* and *Cook*. But this Point was not determined; for the Plaintiff in Error, seeing the Opinion of the Court, put in Bail. *Vide antea.*

Twells *ver*. Southwell, Trin. 6 Geo. II. *B. R.*

Judgment.

MR. *T.* moved to set aside a Judgment for Irregularity; and his Objection was, that common Bail was filed in a Term subsequent to the Writ; this was an Action by *Latitat*, returnable the first Day of *Hilary* Term, and the Bail was not filed till *Easter* Term following, at which Time the Declaration was delivered.

The King *versus* Cotton & *al'*, Trin. 6 Geo. II. *B. R.*

Information.

UPON Motion for an Information the Case appeared to be this: By a private Act of Parliament made 27. *El.* the Court-Leet for the *City and* Liberty of *Westminster* was confirmed, and a more extensive Jurisdiction given, *&c.* *Vide* the Statute. A Complaint was made in the Leet against *Edwards* (the Prosecutor) for Neglect of Duty; he behaved himself in a very insolent Manner, and made

made use of very contemptuous Language; put on his Hat in the Face of the Court, and said to the Judge, "*Jack Cotton commit me if you dare*". Whereupon the Defendant did (134.) commit him for this offensive Language and the great Contempt he shewed the Court. *Edwards* now came for an Information, suggesting that he was committed for a Neglect of Duty, notwithstanding he offered to put in Bail. But the Court, upon the Circumstances of the whole Case, refused the Motion; and held, that had the Commitment in this Case been for a Breach of the Peace, it had not been strictly justifiable, admitting Bail was offered. But this Commitment was for the Contempt; and tho' the usual Method of proceeding in those Cases, is in the first place to fine the Offender, and after to commit him for Non-payment, which Method was not pursued in the present Case, yet this appears rather to be a *Mistake in Judgment than any wilful Oppression; and therefore the Information was denied.*

Note; *Edwards* was a Petit Constable of the Leet.

Term Mich. 7 Geo. II.

NOTE, That this Term Sir *Philip York*, his Majesty's Attorney General, was made Lord Chief Justice of *England*, and the same Term was made a Peer of *Great Britain* by the Name of *Philip* Lord *Hardwicke*.

Barker

Barker *ver.* Reynolds *and* Westwood, Mich. 7 Geo. II. *B. R.*

Trespass and assault, an ill Justification thereto.

TRespass and Assault; *Reynolds* the Master pleads *Son Assault*, &c. and upon that *Issue is joined. Westwood* the Servant justifies, *for that the Plaintiff having assaulted his Master, he then and there assaulted the Plaintiff in Defence of his Master; and to this the Plaintiff demurs.*

Mr. *A.* Counsel *pro Quer'* insisted, that the Justification was insufficiently alledged, and took two Exceptions; 1*st*, Tho' a Man may justify in Defence of his Master, yet he cannot justify an Assault in Defence, &c. and cited 2 *Roll. Abr.* 546. His second Objection was, that the Justification in this Case is ill pleaded; for the Assault in the Declaration might be at a Time preceding the Assault by the Servant, as this Justification now stands. The Words are, (*having assaulted*,) and tho' the Court should be of Opinion that a Servant may justify an Assault, &c. in Defence of his Master, yet he cannot justify an Assault upon the Plaintiff at a Time subsequent to the Assault made upon the Master.

Mr. *M.* Counsel *cont'*. A Servant may justify an Assault in Defence of his Master, and cited 9 *Ed.* 4. 48. 2 *Rol. Abr.* 546. 1 *Salk.* 407. *Leeweard & Ux'* ver. *Basilee.* As to the second Objection, he said the Justification was well, for that the Words must necessarily be in the Preterperfect Tense, and could not be otherwise; for an Assault must have been

(135.)

been committed, or it is certain the Defendant could not justify. And the Words (*then and there*) shew that the Assault mentioned in Justification was at the same Time and Place the Assault was made upon the Master.

Y. C. J. *There is no doubt but a Servant may justify an Assault in Defence of his Master; but the Question in this Case is, whether the Defendant by his Plea has shewn that the Assault was necessary in Defence of his Master*; for it is only said, *the Plaintiff having assaulted*, &c. *he then and there*, &c. *in Defence of his Master*, which certainly is not sufficient; but he ought to have gone further, and shewn that the Plaintiff would then and there have beat his Master, if he had not Assaulted the Plaintiff in Defence, &c. *The Words, as they are now pleaded*, (having assaulted) *have Reference to a Time past*; whereas the Defendant should have shewn *that the Assault by him was at the Time the Master was Assaulted*; *and the Words* then and there *will not confine this Assault to that Time, but may relate to the Day and Place only*; whereas the Assault by the Servant might be at a different *Time of the Day to the Assault made upon the Master*. *P. P.* and *L. J.* being of the same Opinion, *Judgment was given for the Plaintiff.*

Cowne *versus* Barry, Mich. 7 Geo. II. *B. R.*

Debt upon Bond.

ACTION of Debt upon Bond conditioned to pay 100 *l.* with Interest on the 5th of *June*,

June, &c. Defendant after Oyer pleads Payment of Principal and Interest before the Action brought, *scil.* on the 26th of *March*, which was before the Day mentioned in the Condition. Plaintiff replies, that the Money was not paid *modo & forma*, as alledged in the Defendant's Plea. Upon this Issue was joined, and Verdict for the Plaintiff. Mr. *K.* Counsel moved for a Repleader; for that the Defendant having pleaded Payment before the Day mentioned in the Condition, the Issue thereupon is immaterial; and so he said it had often been determined in this Court.

Plea of Payment at a Time before the Day in the Condition, aided by the Statute for Amendment of the Law, and a Repleader denied.

(136.)

Mr. *B.* Serjeant *cont':* The Defendant's Plea is not that the Money was paid before the Day mentioned in the Condition, but the Payment was *ante impetrationem Brevis*, scil. 26 *March*, which Plea is now aided by the *Statute for Amendment of the Laws*; and the *Scil.* is immaterial. *Vide Stat.* 4 & 5 Ann. c. 16. *which provides, that where an Action of Debt is brought upon any Bond which has a Condition, or Defeazance, to make void the same upon Payment of a lesser Sum at a Day or Place certain, if the Obligor, his Heirs,* &c. *have paid the same before the Action brought, tho' such Payment was not made strictly according to the Condition, yet it may be pleaded in Bar of such Action, as if the same had been paid at the Day and Place according to the Condition.* The Court being of the same Opinion, *viz.* that the Defendant's Plea was aided, the Motion for a *Repleader was denied.*

Thomas

Thomas *ver.* Bishop, Mich. 7 Geo. II. *B. R.*

Assumpsit *on an Inland Bill of Exchange.*

A *Ssumpsit* by *Thomas* Indorsee of a Bill of Exchange drawn upon the Defendant *Bishop*, and accepted by him, " *At thirty Days* " *Sight pray pay to Mr.* Somerville *the Sum of* " 200 l. *and place it to the Account of the* York- " Buildings *Company*, *as per Advice*, Charles " Mildmay." And the Bill was directed to the Defendant *Bishop*, *Cashier of the* York-Buildings *Company*, *at their House*, &c. *who accepted the same.* *P.* J. before whom this Cause was tried, directed the Jury to find for the Plaintiff, the Defendant having generally accepted the Bill in his own Name; but at the same Time gave the Defendant Leave to move for a new Trial.

Mr. *K.* and *S.* Counsel insisted, that the Defendant was not liable personally, but as Cashier of the Company; and this appears not only upon the Face of the Note, but from the Letter of Advice to which it refers, and which was given in Evidence upon the Trial. For the Note is not only directed to *Bishop*, Cashier of the Company, but is expresly mentioned to beplaced to Account of the Company. The general Acceptance by the Defendant in this Case, can make no Alteration in the Note, so as to charge him personally; for Acceptance must be taken *secundum subjectam materiam*, as Cashier; he is not therefore bound by this Acceptance *in proprio jure*, but in Right of the Company; and this is the general Method of

of transacting Bills of this Kind. *So is the Case of all Draughts upon the Bank, the Note is generally drawn upon the Cashier, without any Mention of the Company, and yet there is no Question but the Bank is responsible.* The Plaintiff is not without Remedy, the Company is bound by this Acceptance, and he has his Action against them. Whether this Bill was accepted by the Defendant in his own Right, or in Right of the Company, is a Fact proper for the Determination of a Jury; and this is the Circumstance upon which we ground our Motion. Upon the Face of the Bill there is strong Evidence in Favour of the Defendant, that his Acceptance was in Right of the Company; and this is yet much stronger, by Reference to Letter of Advice. (137.)

D. Serjeant *cont'*: Whether the Defendant accepted this Bill in his own or the Company's Right, is not now the Question. The Defendant has generally accepted it in his own Name, and that makes him liable *in proprio jure*; any Man may accept: Suppose a Bill drawn upon *J. N.* it may be accepted by *J. S.* and by this Acceptance *J. S.* becomes liable. The Direction to the Defendant as Cashier, *&c.* is only a proper Addition and Description of his Person. It is said, he accepted it in Right of the Company, and as their Servant; but how can this be known? the Acceptance is general in his own Name. There is no Question but a Servant may have Transactions of his own, and may contract upon his own Account. *Bills of Exchange must have a Certainty, the Acceptance reduces it to a Certainty*;

tainty; the Bill is drawn upon *Bishop*, and he has accepted it in his own Name generally, *and the Acceptance alone is sufficient to charge him.*

Y. C. J. Bills of Exchange are Bills of a particular Nature, arising from the Contract and Transactions of Merchants; *the first Contract is by the Drawer*, and by that he *becomes liable*; *after Acceptance it is the Contract of the Drawee*; *and a further Contract may arise from the Person to whom the Bill is payable, by his Indorsment over. But every Writing that is drawn in Form of a Bill of Exchange may not in Fact be so*; *as where Money is payable out of a particular Fund*; and so was the Case of *Jenny* and *Heale*, *Trin.* 10 *Geo.* 1. *Plaintiff* Jenny *sold his Land to the Defendant, who gave him a Bill for the Price or Value thereof in these Words, directed to one* Prat, *Sir, you are to pay to Mr.* Jenny *so much*, &c. *out of the Money belonging to the Governors and Company of* Devonshire *Miners*, &c. *the Money* not being paid, *Jenny* brought his Action upon this Note, supposing it a Bill of Exchange; *and upon Demurrer Plaintiff had Judgment*; whereupon Error was brought in this Court, and Judgment reversed; for the Court held it to be no more than a Direction and Appointment to pay Money out of a particular Fund, and was not a Bill of Exchange. *Vide* this Case in *Mod. Ca.* 266 (*i. e.* 8 Mod.). And so
(138.) was the Case of *Joslyn* and *Lucern*, *Trin.* 13 *Ann.* which was to pay Money out of growing Stock; and these Notes do not make the Drawer liable in case the Stock should fail. *It is a general*

general Rule, that the Acceptor of a Bill of Exchange is personally liable; how then does this Case vary? the Directions to the Defendant as Cashier, *&c.* cannot vary it; that is meerly a Description and Addition of his Person. The Acceptance in this Case is general, (accepted *June* 13. 1733. and signed *Bishop*.) In all Cases a general Acceptance is *secundum tenorem Billæ*; this Bill is drawn upon *Bishop*, and the subsequent Words, *viz.* "Place it to "Account of the Company, as *per* Advice," cannot alter the Case, nor make any Difference in the Bill of Exchange; it is only the Method of accounting for the Money between the Drawer and Drawee after it is paid. As to the Letter of Advice, that is not proper Evidence; it is extrinsical of the Bill, and is always a private Transaction between the Drawer and Drawee, to which the Person to whom the Money is payable is not supposed privy; if Letters of Advice should have any Weight in these Cases, it would be of dangerous Consequence. Bills of this Kind are in their Nature negotiable; and such an Allowance must make them uncertain, and may be attended with ill Consequence in the Case of an Indorsee, who is in Nature of a Purchaser for a valuable Consideration. The Case of *Evans* and *Cramlington*, is stronger than this. *Vide* 2 *Ventr.* 307. *Carth.* 5.

We must therefore judge of this Case as it stands upon the Face of the Bill, *which is a Bill drawn upon* Bishop, *and accepted by him generally, which alone is sufficient to charge the Defendant and make him personally liable.*

P. P.

P. P. and *L.* Justices, being of the same Opinion, the Motion was denied, and Plaintiff suffered to have Judgment upon the *Postea.* Vide *Yelv.* 137. *Talbot* versus *Godbolt*; *G.* gave a Bill in this Form, "*Memorandum, that* "*I have received of* E. Talbot, *to the Use of* "*my Master Serjeant* Gaudy, *the Sum of* 40 l. *to be paid at* Michaelmas *following.*" It was held that *G.* was liable, for the *Clause of Repayment is general*, and not to be repaid by *his Master* Gaudy.

Evans *ver.* Thrustout, Mich. 7 Geo. II. *B. R.*

Variance between the Declaration and Original.

(139.)

IN Ejectment, Plaintiff declared upon the Demise of *John*, and in the original Writ it was said to be the Demise of *Timothy*; after Verdict for the Plaintiff, it was moved in Arrest of Judgment by Reason of this Variance; and said, if in Fact there had been no Original it had been cured by the Verdict, but a bad Original is not cured.

Y. C. J. The Demise cited in the Declaration is only by Way of Recital, and the Defendant cannot take Advantage of a bad Original, *but upon Oyer or a* Certiorari. 2 *Salk.* 701, 658. *Bragg* versus *Digby*, 6 *Mod.* 28.

The

The King *ver.* Dr. Bettesworth, Mich. 7 Geo. II. *B. R.*

MR. *S.* moved for a *Mandamus* to be directed to the Spiritual Court, to grant Administration *cum testamento annexo* to *Kinnaston*, residuary Legatee of *K.* his Father deceased, the Executors having renounced in Favour of the residuary Legatee. We have applied to the Spiritual Court, and they refuse no Administration till such Time as they have issued out a Commission of Appraisement, and had a Return. This is contrary to 21 *H.* 8. which provides, *that Administration shall be granted with all convenient Speed*; *and cited the* King *and* Bettesworth, which was in the Case of *Lord* Londonderry's *Will*, where Executors applied to the Spiritual Court for Probate, but the Court refused till a Commission, *&c.* as in this Case; but this Court granted a *Mandamus*, and said the Spiritual Court had no Power to stay Probate.

Mandamus *to the Spiritual Court to grant Administration to the Residuary Legatee, on the Executor's renouncing.*

Y. C. J. There is a great Difference between the Cases; here the Executors have renounced, and there is no Law obliges the Spiritual Court to grant Administration to the residuary Legatee. Shew Cause. *Note*, That afterwards, upon shewing Cause, the *Mandamus* was denied.

Denied.

Stephens

Stephens *ver.* Loftyn, Mich. 7 Geo. II. *B. R.*

Debt by simple Contract cannot be set off against a Debt upon Bond, by Statute 2 Geo. 2.

IN Debt upon a Bond the Plaintiff declares the Defendant 30 *May* 1723. by his Bond obligatory, became indebted to the Plaintiff in the Sum of 76 *l.* 10 *s.* &c. *Defendant craves Oyer of the Bond and Condition*, which was for Payment of 38 *l.* 5 *s.* upon the first of *December* next ensuing the Date of the Bond, with Interest, &c. and then pleads the Stat. 2 *Geo.* 2. *which impowers the Defendant to set off mutual Debts in Discharge of the Action*; and avers, that the Plaintiff stood indebted to him in the Sum of 70 *l.* 8 *s.* due upon simple Contract, which is more than the Sum mentioned in the Condition. Upon Demurrer to this Plea, Judgment was for the Plaintiff in the Common Bench, whereupon the Defendant brought Error in this Court.

(140.)

Mr. *D.* Counsel for the Plaintiff in Error: There are two Exceptions taken to this Plea, 1*st*, That by this Act of Parliament, *Debts upon simple Contract cannot be set against Debts of a superior Nature.* And 2dly, *That the Penalty of the Bond, not the Sum mentioned in the Condition, is the Debt in Law.* As to the first he said, where Debts are mutual, this Act of Parliament is to be considered in Nature of an Extinguishment, according to the Rule laid down in *Wankford*'s Case, 1 *Salk.* 305. *where the same Hand that is to receive, and ought to pay, it is an Extinguishment. This therefore may*

may be compared to an Action of Debt upon Bond, where Payment before the Action brought is a good Plea in Bar, by the Statute for Amendment of the Law. It is objected, that this may be inconvenient in *Cases of Executors, and work a* Devastavit, but the Inconveniences on the other Hand is as great, *Suppose an Executor brings Debt upon Bond due to his Testator, who at the same time stands indebted to the Defendant in the like Sum upon simple Contract, unless the Debt can be given in Evidence in Discharge of the Bond, the money recovered must go in Discharge of Debts of a superior Nature, and Defendant is without Remedy upon Failure of Assets.* This Act of Parliament is a remedial Law, and ought to be construed liberally; it ought to be considered in the same Light with other Acts of Parliament, where mutual Debts are to be set one against the other; as the Bankrupts *Act*, 5 Geo. 2. *all Debts are included*; *and there is no Distinction between Debts upon Specialties and simple Contracts. In the Case of Retainer by Executor, he is not obliged to plead it, but may give it in Evidence upon* Plene Administravit, *and the Reason is because it amounts to Payment.*

Mr. *C.* Serjeant *cont'*: The principal Question in this Case is, whether the Penalty or the Sum mentioned in the Condition is the Debt in Law; for if Penalty is the Debt in Law, then the Defendant's Plea is ill; for the Sum to be set off in Discharge is not of equal Value, the Penalty is for 76 *l.* 10 *s.* and the Debt upon simple Contract is only 70 *l.* 8 *s.*

After Forfeiture of the Bond the Penalty is

the Debt in Law, and the Condition cannot be given in Evidence. 3 Lev. 368. *and so was the Case of the Bank of* England *and* Morrice, Pasch. 6 Geo. 2.

(141.) *Y.* C. J. The Act of Parliament in Question was made for the Benefit of the Defendant, and must be construed in his Favour, so far as is consistent with the Rules of Law. This Act cannot be construed so but Inconveniences will arise upon it either one Way or the other. It is true, in the Case of an Executor it may work a *Devastavit*, and yet on the other Hand, it is hard that an Executor should recover Debts upon Bond due to his Testator, and the Defendant not have it in his Power to set off Debts upon simple Contract, tho' of equal Value in Discharge. *The Rule that is laid down comes too general; suppose an Action is brought for Breach of Covenant, which sounds in Damages, and the Plaintiff at the same Time stands indebted to the Defendant upon simple Contract, which sounds in Damages likewise; it is pretty hard to say that one Debt cannot be set off to discharge the other.* It is said, this Act ought to have the same Construction put upon it with other Acts wherein mutual debts are mentioned; and for this Reason the Bankrupt's Act is cited; but this Case differs; for by the Bankrupt's Act all Debts are made equal, and therefore no Notice is taken of Priority of Debts; besides, Commissioners of Bankrupts have an Equity in them, *and in Equity all Debts are equal.*

The chief Question is, whether the Penalty is the Debt forfeited by Law? for if so, the Debt

Debt pleaded in Bar or Discharge is not equal in Value to the Debt demanded by the Bond, and consequently the Plea is bad; *there is no Question but the Penalty is the Debt forfeited by Law, and therefore the Plaintiff must have his Judgment.*

P. and *L.* Justices: This Case must be determined as it stands upon Record; and the Question is, whether his Plea is a good Bar? Defendant has pleaded mutual Debts, *&c.* but the Sum to be set off by his Plea is not equal in Value to the Demand. The Penalty is the Debt forfeited by Law, and no Way to discharge it, *but by pleading Performance. The Statute for Amendment of the Law does not extend to this Case; the Statute makes Payment after the Day, and before the Action brought, good Payment in Discharge of the Bond; as* Solvit ad diem *was a good Bar at Common Law.*

The Defendant's Plea in this Case is not good; and so gave Judgment for the Plaintiff, without giving any Opinion upon the first Objection. Note; *The Law in this Respect is since altered by* Stat. 8 Geo. 2. c. 24.

Ashtell *versus* Beaker *&* *al'*, Mich. 7 Geo. II. *B. R.* (142.)

Scire Facias *against Bail.*

SCIRE *Facias* against Bail. *Defendants pleaded that no* Ca' Sa' *was prosecuted and returned* ante diem emanationis originalis Brevis de *Sci' Fa'*.

To this the Plaintiff demurred as an imma-

terial Plea, for a Ca' Sa' *may be returnable the same Day the* Sci' Fa' *issues; and this has always been held good by the Practice of the Court.*

Mr. *D.* Counsel compared it to the Statute of Limitations, which is always pleaded *ante diem exhibitionis Billæ*, or *ante diem impetrationis Brevis. He likewise objected to the* Sci' Fa', *because it did not appear the Plaintiff had prayed Execution, and without Prayer he cannot have Execution; and cited* 1 Rol. Abr. 894. 3 Mod. 252.

Y. C. J. *The Plea is immaterial, because the* Ca' Sa' *may be returnable the same Day the* Sci' Fa' *issues, which is agreeable to the Practice of this Court*; and therefore the Pleading must be *ante emanationem Brevis, &c.* the Reason for Pleading the Statute of Limitations in that Manner is, *because those are the Words of the Act of Parliament.*

P. P. and *L.* Justices, being of the same Opinion, Judgment was for the Plaintiff, unless Cause, *&c.*

Warrener *versus* Thrustout, Mich. 7 Geo. II. *B. R.*

Ejectment.

IN Ejectment. Mr. *Common Serjeant* moved to amend a Declaration, which was for several Messuages and three Acres of Ground; the Amendment prayed was to strike out the Word (*Ground*), and instead thereof to make the Declaration for three Acres of Arable Land; and cited a Case 2 *Geo.* 2. where the Plaintiff

Plaintiff declared *de Messuagio sive Tenemento*; and upon Motion Leave was given to strike out the Words (*sive Tenemento*); and both this and the original Case was before Appearance.

Cur': To strike out the Words (*three Acres of Ground*), and add others which are of a different Nature, *is altering the Demise*, and therefore denied the Motion; but gave Leave to strike out three Acres of Ground.

Whiteham, *Qui tam, and* Jokeham, Mich. 7 Geo. II. *B. R.* (143.)

Information Qui tam, &c.

INformation *Qui tam, &c.* for buying and selling Sheep in the same Market, contrary to 5 & 6 *Ed.* 6. *c.* 14. To quash this Information two Objections were taken. 1*st*, Because no Affidavit was made by the Person who commenced the Prosecution before the Issuing of the Information, that the Offence was committed in the same County where the Suit is commenced. *Vide* 21 Jac. 1. c. 4. *No Officer or Minister in any Court of Record shall receive, file or enter of Record any Information*, &c. *until the Informer or Relator has first taken a Corporal Oath before some of the Judges of that Court, that the Offence laid in such Information*, &c. *was committed within a Year, and within the same County where such Information was commenced.* The second Exception was, that the Fact was laid subsequent to the first Day of the Sessions.

Mr.

Mr. *L.* Counsel insisted, *that this Information could not be quashed upon Motion*; Informations *Qui tam* are in Nature of Civil Actions, *and no Instance that a Civil Action was ever quashed upon Motion.* 1 Inst. 139. The Objection is, that no Affidavit appears upon Record; but that does not make the Information void, the Words of the Act are, *That no Information shall be received, filed or entered of Record*, &c. so that altho' the Proceedings are irregular, the Information may well stand. *Carth.* 503. *Salk.* 376. *No Information shall be received or filed before Recognizance given by the Informer to prosecute with Effect*, &c. Stat. 4 & 5 W. 3. c. 18. and that it was held upon Construction of this Act of Parliament, that in Case no Recognizance be given, the Information is not void, but Process thereon must be set aside. But in this Case the Act of Parliament has been complied with; for here Affidavit has been made by *the Relator, which is agreeable to the Words of the Statute*; and in this Case it is reasonable; *for this is a Prosecution upon a Penal Statute, and if the Informer was to make Affidavit, he could not be an Evidence to convict the Offender.* But admitting the Oath in this Case not sufficient, *the Court will not quash the Information, but where Exception appears upon the Face of the Record*; and no Advantage can be taken of this upon Error, or Demurrer to the Declaration. 4 *Inst.* 272.

As to the second Objection, *he said this Case was like the Case of all special* Memo-
(144.) randums; *for altho' all Declarations are in Fiction*

Fiction of Law supposed to be entered on the first Day of Term, yet a special Memorandum *alters the Case, and ties it down to the Day mentioned in the Declaration.* Sessions commenced 11 *Jan.* but by Adjournment were continued to 12 *Feb.* on which Day the Offence was committed.

Cur' : The Information cannot be quashed upon Motion, and so it is said in Salk. 372. *There is a Difference between a Motion to quash and set aside.* If an Information be filed without Affidavit, the Court may stay Proceedings, or order it to be taken off the File. The Answer which is given to the first Objection is very material; *for in Prosecutions upon Penal Statutes, the Person who appears to be the Informer upon Record, cannot be a Witness*; and therefore Distinction may be made in this Case between *Informer and Relator*; before this Act of Parliament the Informer never appeared upon Record, and so was always admitted an Evidence.

The whole Court being of this Opinion, the Rule was discharged, but principally for the first Reason, *viz. That in Motions to quash Informations, no Advantage can be taken but where the Exception appears upon Record.* Note; *Proceedings are carried on in the same Manner upon* 12 Ann. c. 16. sess. 2.

Smith

Smith *versus* Boucher & *al'*, Mich. 7 Geo. II. *B. R.*

Assault and false Imprisonment.

ACTION of Assault and false Imprisonment *ad damnum* 1000 *l.* Defendants *justify and say, that the Chancellor and Scholars of the University of* Oxon, *from the Time whereof the Memory of Man is not to the contrary, were a Body incorporate by Name,* &c. *and that there now is, and Time immemorial has been, a Court held before the Chancellor, his Commissary,* &c. *on Friday in every Week, for Determination of all Personal Actions whatsoever between the Parties, (one of them being a Scholar of the said University, or Person having the Privilege thereof); and that Time immemorial it has been customary on the personal Complaint before the Chancellor, his Commissary,* &c. *of any Person having Privilege of the said University, that he has an Action personal of Damages against any Person then being within the Precincts of the said University, such Complainant making his Corporal Oath before the Chancellor,* &c. *of such Damages, and that he believes that such Defendant, upon his being cited, will not appear, but rather run away out of the Precinct of the said University. For the Chancellor to decree a Warrant to be made in Writing for the arresting and taking the Body of such Defendant and detaining him in Prison, until such Defendant should put into the said Court sufficient Security for answering the Complaint. And the Defendants further say, that by Letters Patent*

(145.)

Patent bearing Date 1 April, 14 H. 8. *the said Customs and Privileges were confirmed, which said Letters Patent were afterwards* Anno 13 Eliz. *published and confirmed by Act of Parliament. And the Defendants further say, that before the Time when,* &c. *the said* James Boucher *made his complaint before the said Deputy Commissary, that he had an Action personal of Damages against the Plaintiff, then living within the Precincts of the said University; and then and there did alledge that he was damnified in the Sum of* 1000 l. *and that he did suspect that the said Defendant would run away and not appear, if cited according to the Belief of the said* James Boucher; *and that then and there the said* James *took his Corporal Oath of the Truth of the Premisses in Manner aforesaid; and the said Judge then and there decreed a Warrant to be made as was required. Whereupon the said* Hugh Smith, *Plaintiff in the present Action, was arrested and carried to Prison for Want of sufficient Sureties,* &c. *which are the same Assault and Imprisonment as is complained of,* &c.

Plaintiff replies, there was no Affidavit of the Cause of Action filed as the Statute directs; and to this the Defendants demurred. Vide 12 Geo. 1. c. 29. *and* 5 Geo. 2. c. 27.

C. Serjeant: The Replication is bad, for the Act of Parliament does not make the Process void; but the Words are, "That the "Defendant shall not be held to Bail, unless "Affidavit be made that the Cause of Action "is 10 *l.* or upwards;" *so that want of Affidavit does not avoid the Process, but subjects the Party*

Party to an Action. In no Case the Process is in itself void, but where it is expresly provided so by Act of Parliament; *as in* 7 Ann. c. 12. *Process against Ambassadors and their Servants for Debt is declared void.*

H. Serjeant *cont': Jurisdiction is not to be presumed in inferior Courts*, it is therefore incumbent upon them to shew they have a Jurisdiction; but does this appear in the present Case; *they have set forth a Custom to hold Pleas in all personal Actions*, and say, that *B.* made Complaint that he had a personal Action; *but the Nature of that Action is no where shewn.* They ought to have described the Action and Nature of it, or this Court will not intend it to fall within their Jurisdiction. *Hale's Plac. Cor.* 35, 36. *Moore* 275.

But suppose the Description is so certain as to give a Jurisdiction, yet such a Custom as is here pleaded is a void Custom. Here is a Custom pleaded to issue Warrants to arrest
(146.) and detain in Prison till Security be found; but it does not appear that Process in these Cases has any Return, and so *Cap.* void, as in 23 *H.* 6. All Warrants of *Cap.* must have a certain Return. *Dyer* 175. *p.* 23. Every *Cap.* ought to be returned the ensuing Term, *for the Mischief which might otherwise befall the Prisoner to be kept always in Prison.* Cro. Eliz. 467. *Nector* and *Sharp.* The Reason of these Resolutions is *in favorem libertatis*, which is always favoured in Law; and tho' it appears by Plea that a Return was made, yet a Return cannot make good a void Process. There is another Reason which makes this a void

void Custom; because a *Cap.* issues in the first Instance, without any previous Summons, and so is 1 *Mod.* 236. *Hall* ver. *Booth.* It is against Law for any inferior Court to issue *Cap.* for the first Process; for the Liberty of a Man is highly valued in Law, and no Man ought to be abridged of it without some Default in him. It is against the Course of the Law, and all Courts. 1 *Roll. Abr.* 563. *p.* 11. *If this is a void Custom in itself, Confirmation by Charter or Act of Parliament will not avail; for* Stat. *of* Eliz. *is only a general Confirmation,* i. e. *of all reasonable Customs, but does not make that of Force, which before was void in itself.* 1 Inst. 381. *And so it was held,* 1 Salk. 203. *That tho' the Customs of* London *are confirmed by Act of Parliament, yet those Acts extend only to good Customs; and bad Customs are void, and cannot be confirmed.* Plow. 399. *b.* Hob. 85, 86, 87.

C. Serjeant, in Reply, agreed that unless it did appear that inferior Courts had a Jurisdiction, the Process was void; but here is sufficient set forth to give a Jurisdiction. The Custom, that upon Complaint made that the Plaintiff has a Personal Action, and suspects the Defendant will run away, Warrant shall issue; so that we have followed the Custom in our plea. It is said that Custom is void, because contrary to Law; so are all Customs: And in many Cases, Customs not strictly maintainable in themselves have been supported and made effectual by Act of Parliament. *By Custom, Serjeant of the Mace in* London, *upon Plaint of Debt entered in any of the Counters against*

against Defendant, may arrest him by Parol, and carry him to Prison; and this is a good Custom, and yet much stronger than the present Case. Cro. El. 196. *Gerrard* ver. *Dickenson.* So in *Dyer* 229. *p.* 50. *Use of a Freehold Messuage in* London *may pass by Bargain and Sale made by Parol only. Custom of* London, *that where Contract is made between Citizen and Citizen for Payment of Money, and he who made Contract dies, his Executors or Administrators shall be chargeable therewith, as if it were upon an Obligation.* Cro. Eliz. 409. *So that the Debtor may be arrested before the Debt becomes due, to compel him to give Security.* 2 H. 4. 12.

(147.) *Y.* C. J. There are two Objections made to the Defendant's Plea; that no Affidavit was made of the Cause of Action before issuing the Process; and that this is a void Custom. There are a great many Cases where general Words of an Act of Parliament do not extend to Customs, but that is where the Words are in the Affirmative only; as in *Magna Charta*, it is said Court-Leets shall be held but twice a Year, *viz.* at *Easter* and *Michaelmas*; and yet Custom to hold at different Times is good: But, in the present Case, here are negative Words; and it is generally held in those Cases, that Customs are included. Suppose therefore this Act of Parliament does extend to inferior Jurisdictions, and no Affidavit is made before issuing out the Process, the Judge, the Officer and Gaoler will not be subject to false Imprisonment. That is carrying the Construction of the

the Act of Parliament too far, for there are no Words to make the Process void. I don't say in this Case no Action will lie, *but it must be against the Party only*. Where a Court has an original Jurisdiction, tho' the Proceedings are not strictly regular in Pursuance of that Jurisdiction, yet the Judge and Officer who execute that Process are not liable. *And to this Purpose, see a notable Case in* 2 Lutw. 937, 1560. *for the Process in those Cases is not void, but erroneous only.*

It is objected, here is a Justification out of an inferior Court, by a *Capias* without summons, which is said to be void, and that no Custom can support it; *but such Process surely is not void, but voidable only. And in* Mackalley's *Case*, 9 Rep. 68. This Process by Custom of *London*, which is confirmed by Act of Parliament, is held to be good. *Vide* 2 *Lutw.* 1565. This Construction may go a great way in the present Case, for the Customs of the University are confirmed in Parliament. It is true, an Act of Parliament cannot confirm Customs void in themselves; but the Parliament may confirm Customs which perhaps could not support themselves.

P. J. The Question is, Whether the Proceedings are void, or voidable? There is no Doubt but where the Court has an original Jurisdiction, Error in Proceedings does not make the Process void, but erroneous only: *As service of Process out of Jurisdiction, the Process is not void in that Case.* The Act of Parliament requires, that Oath shall be made of the Cause of Action, and whether this is not

not a Condition precedent to the Jurisdiction, requires further Consideration.

P. J. General Confirmation will not establish Customs inconsistent with natural Justice. Here the Custom is; the Party must make Complaint of his Cause of Action, and must verify by Oath the Certainty of Damage; but, in the present Case, he only swears he is damaged, *&c.* as he believes; which is not (148.) sufficient; but this Defect does not make the Process void: For where the Defendant is arrested upon a Process at Law, and there is a Defect in Affidavits, that does not vitiate the Process, but this Court will discharge the Defendant upon his common Appearance; but neither Judge, nor Officer who executes the Process, are liable to an Action.

L. J. The Question in this Case is not so much to the Custom, for that does not seem unreasonable, for Process is not to issue, but upon Complaint and Oath of the Plaintiff; but whether the Defendants had brought themselves within this Custom. A *Cap.* without a *Sum.* as this Case is pleaded, is not unreasonable, for it does not issue but upon Oath that the Defendant upon Citation will not appear, and surely a Summons in such Case must be needless. The Act of Parliament requires, that an Oath shall be made that Cause of Action amounts to 10 *l.* or upwards; but the Omission of such Oath does not affect the Jurisdiction. *The Doubt that I have is, whether here ever was any Jurisdiction, which extends only to personal Actions?* How does this appear to be a personal Action? *They ought*

ought to have shewn the Nature of the Action, that this Court might judge, whether within Jurisdiction, or not? In all Cases where Persons who hold Plea, have Power and Jurisdiction, tho' the Process thereupon be erroneous, yet it is not void, but voidable. But where a Court awards Process, without having an original Jurisdiction, it is utterly void. As if Justices of Common Pleas should hold Plea upon Appeal, the Process and Proceedings are utterly void, and the Officer who executes the Process is a wrong Doer. *Vide Moore* 275.

Y. C. J. That is because the Court has no Jurisdiction as to the Nature of the Action: But here is a Jurisdiction only irregular in executing it. The *Stat.* 21 *Jac. c.* 4. is that, before Information filed or received, an Oath shall be made, *&c.* but where Information is filed without Oath, the Proceedings are not void, but voidable. *Stands over.*

Middleton *&* *Ux' versus* Crofts, Mich. 7 Geo. II. *B. R.*

Libel.

LIBEL exhibited against the Plaintiffs in the Spiritual Court for a clandestine Marriage. Several Facts were charged in the Libel, *viz. That the Parties were married without Licence or Publication of Banns; that the Marriage was at uncanonical Hours, between one and three o'Clock in the Morning, and in a private Dwelling-house.* Upon Motion for a Prohibition, the Plaintiffs suggested, *That they could have proved the Marriage by one competent*

(149.) *petent Witness; and that they had a regular Licence, but that the Spiritual Court refused to admit the Evidence of one Witness only.* The second Suggestion was, *That by* Stat. 7 & 8 W. 3. *this was made a temporal Offence, with Penalty of* 10 l. *to be recovered against any Man so married without Licence or Publication of Banns. Andrews* D.L. argued against the Prohibition; and, in the *first* Place, *He admitted, that where Ecclesiastical Courts have an original Jurisdiction, and an Incident happens which is of temporal Conuzance, they shall try the Incident, but shall try it as Courts of Common Law would. But where the Ecclesiastical Court proceeds in a Matter meerly Spiritual, if they proceed in their own Manner, tho' contrary to the Form of Proceedings at Common Law, no Prohibition lies. In this Case it is not necessary for the Defendants to produce one Witness, for Proof lies on the Part of the Promoter of the Suit; he exhibits the Libel for a clandestine Marriage, and therefore it is incumbent on him to prove the Marriage.* As to the Licence, there is no Proof at all necessary, that must be under the Hand and Seal of the Ordinary; and in those Cases *Index loquitur per Sigillum.* The single question therefore is, whether the Ecclesiastical Jurisdiction is taken away in these Cases by *Stat.* 7 & 8 *W.* 3. This Act of Parliament respects the *Revenue only*, and Penalty therein for marrying without Licence, and is not given as a Punishment for clandestine Marriage, *but to prevent Fraud in depriving the Crown of Duties given for licensing Marriages.* And therefore, in all Cases where there

there is a Licenſe or Publication of Banns, the Act is ſatisfied, tho' ever ſo irregularly obtained, and no temporal Puniſhment for Irregularity, *which is an Offence in the Spiritual Court, and there only puniſhable.* It is held in *Lindw.* That a clandeſtine Marriage ſubjects all Parties, even Witneſſes themſelves, who are voluntarily preſent, to Excommunication; which is the Reaſon that in Proſecutions of this Nature the Witneſſes are abſolved *ratione teſtificandi.* Vide *Conſtruction of Archbiſhop* Sancroft, *and confirmed* 25 H. 8. c. 19. Sect. 7. Canon 101. *Marrying at uncanonical Hours prohibited.* Canon 102. *Marriage in private Dwelling-houſes.* Can. 105. *No Licence to be granted where either Parties are under Age, but by Conſent of Parents,* &c. *and every Licenſe otherwiſe granted void, and Parties puniſhable.* In this Act of Parliament no expreſs Words to prohibit the Juriſdiction of the Spiritual Court, and tho' no particular Saving, yet the Juriſdiction is not deſtroyed but by expreſs Words, as in Caſe of Tithes, 23 *H.* 8. *c.* 2. 2 *&* 3 *Ed.* 6. *c.* 13. becauſe no excluſive Words, Juriſdiction remains. So 22 *&* 23 *Car.* 2. *c.* 10. *which gives Directions concerning Diſtribution; Proceedings thereon may be by Bill in Equity, and yet no Doubt but Spiritual Courts have a Juriſdiction in thoſe Caſes.* In Caſe of Pluralities, where any Eccleſiaſtical Perſon holds two Benefices with Cure *ſimul & ſemel,* the Spiritual Courts have a Juriſdiction which is not taken away, by 21 *H.* 8. for that Statute extends only to Cures of the Value of 8 *l. per Ann.* ſo that there may be a Plurality within (150.)

the *Statute*, and a Plurality by the *Canon Law*. In the like Manner, 21 *H.* 8. *c.* 13. enjoins Residence upon Forfeiture of 10 *l.* Here is a Penalty inflicted, and no Saving to preserve the Jurisdiction of the Ecclesiastical Courts; but because no negative Words to restrain the Jurisdiction, it still remains an Offence punishable by Ecclesiastical Law. The Jurisdiction of Ecclesiastical Courts in Cases of this Nature are vindicated by Reason of the Common Law, *as in Cases of Nusance indictable at Common Law, tho' a new Penalty be inflicted, yet the Punishment at Law remains. So at Common Law an Indictment lies for an Assault and Battery; and an Action will lie also for the same Assault.* In all these Cases it may be objected, that the Defendant suffers twice for the same Offence, but the Punishment is *diversis rationibus*, the 9 *Ed.* 2. *Articuli Cleri*, gives an Action *de violenta injectione manuum in Clericum*, and yet the Ecclesiastical Courts may excommunicate the Offender. 2 *Inst.* 620. *Articuli Cleri*, *c.* 3. And the Reason is given, 2 *Inst.* 622. *c.* 6. for that the Proceedings in both Courts are *diverso intuitu: As if one lay violent Hands on a* Clerk, *pro salute animæ, shall injoin him Penance in the Spiritual Court, and the Clerk may have his Action, and recover Damages at Common Law for the Injury.* So the Case of *Slader* and *Smalbroke*, 1 *Lev.* 138. A Layman forged Orders, and obtained a Benefice, for which he was prosecuted in the Ecclesiastical Court, *and Order for Deprivation*; and he prayed Prohibition, because Forgery is triable at Common

mon Law: but Prohibition was *denied*, for the Forgery was touching an Ecclesiastical Matter, and he is sueable there for it, in Order to his Deprivation only. *Hil.* 16 *Car.* 2. *Kerby* and *Savile*. *Prosecution in the Spiritual Court for calling the Defendant* Bawd; R. *moved for a Prohibition, suggesting that* K. *had brought his Action at Common Law, and recovered; but the Prohibition was denied, because the Proceedings are* diversis rationibus, *the one for Damages, and the other* pro Salute animæ, & pro reformatione morum. The present Case comes within the Reason of all these Cases. The Prosecution upon *Stat.* 7 & 8 *W.* 3, is for defrauding the King of his Stamp-Duty, but in Ecclesiastical Courts the Proceedings are *pro Salute animæ*, both Courts proceed *diverso intuitu*, and therefore a Prohibition ought not to be granted. 5 *Rep.* 51 *b. de jure Regis Eccles.*

Mr. *S.* Counsel on the same Side. This is a Prosecution for a clandestine Marriage, and the Charge consists of four Particulars; That it was without Licence or Publication of Banns; was performed at uncanonical Hours, and in a private Dwelling House. The Foundation upon which a Prohibition is moved for, stands singly upon *Stat.* 7 & 8 *W.* 3. *For, as to the first Suggestion, there is no Affidavit to support it, and therefore the Court can take no Notice of this Case, but as it appears upon the Face of the Libel.* It is said, that Prohibition ought to go, because a Penalty being given by the Statute, this is now become a Temporal Offence, and Jurisdiction of the (151.)

Spiritual Court is by this Means taken away. But supposing the Objection to have that Force which is contended for, it can extend no further than the Penalty reaches, and that is to the Husband alone: Besides, the Suggestion extends only to Part of the Libel, for the Penalty given by Statute is for marrying without Licence only; whereas the Prosecution in this Case is not only for marrying without Licence, but for marrying at uncanonical Hours, and in a private Dwelling-House, which are Offences not within the Act of Parliament, and the Penalty given by the Act is not proportionable to the Offence, but adequate to secure the Duty arising from the Stamp to the Crown. There are many Cases where Common and Canon Law have concurrent Jurisdictions, and it has been held, even in the Case of a Custom, that Suit may be in the Spiritual Court, as in 1 *Sid.* 146. 1 *Vent.* 3. *Fitz. Nat. Brev.* 51. *If Pension is due by Prescription, it is at the Election of the Party either to sue at Common Law or in the Spiritual Court, contrary to the Opinion of Lord* Coke, 2 Inst. 491. *So a Man may have an Action* pro bonis asportatis cum uxore, *and at the same Time the Defendant may be libelled in the Spiritual Court for Adultery*, because the Proceedings are *diverso intuitu*. So in the Case of *Townsend* versus *Thorpe*, *Hil.* 12 *Geo.* 1. (2 Ld. Raym. 1507). *The Plaintiff was indicted at Common Law for Drunkenness*, & alia enormia crimina, *and at the same Time libelled against in the Spiritual Court, in Order to Deprivation; and tho' in that Case the Court did stay*

stay Proceedings upon the Libel, pending the Indictment, yet afterwards Consultation was granted.

C. and *G.* Counsel *e cont'. We have no Affidavit to verify the first Suggestion, and therefore that must be given up:* But, as to the second, they insisted, that this was not an Offence punishable in the Spiritual Court. *It may be an Offence in the Parson who marries,* but can be none in the Parties married. As to the Canons of 1603, *they do not bind the Laity, for they have neither been read in Courts of Common Law, nor confirmed by Act of Parliament.* Vide Gibson's Codex, 2 Salk. 672, 412. But supposing Spiritual Courts had a Jurisdiction in these Cases, that Jurisdiction is now taken away by *Stat.* 7 & 8 *W.* 3. which has made this a temporal Offence, and inflicted a Penalty upon the Party offending. This Statute gives the Sum of 10 *l.* to be recovered against the Man marrying without Licence, and so far at least the Ecclesiastical Jurisdiction is gone, *and tho' this Penalty does not reach all the Facts charged in the Libel, yet their Jurisdiction being gone, as to Part, the Prohibition must go to the Whole, as in* Hob. 192. *Berrie's* Case. In this Act of Parliament here is no particular Saving of the Jurisdiction of Spiritual Courts; and in all Cases where the Common Law or Statute gives a Remedy *in foro seculari*, whether the Matter be Temporal or Spiritual, the Conuzance of that Matter *belongs to the King's Temporal Courts* only, unless the Jurisdiction of the Spiritual Courts be saved by that Statute which gives (152.)

gives the Penalty. 2 *Salk.* 673. And for this Reason, 10 *Ann'. c.* 19. *in a Clause to prevent clandestine Marriages, the Jurisdiction of Spiritual Courts is particularly saved: So in* 1 Jac. 1. c. 11. *To prevent Persons from marrying during the Life of the first Husband or Wife.* 1 Eliz. c. 2. *Act of Uniformity.* 13 Eliz. c. 5. *Of Usury.* 31 Eliz. c. 6. *Of Simony.* 4 Jac. 1. c. 5. *Of Drunkenness. And in many Cases where Acts of Parliament have imposed further Penalties in Ecclesiastical Offences, there is a Saving added for Jurisdiction of Ecclesiastical Courts.* 2 Salk. 672. *It is said, where Spiritual Courts proceed* diverso intuitu, *the Jurisdiction remains: But why? Because in these Cases the Common Law gives no Remedy. As in* 1 Lev. 138. *where a Layman forges Orders, the Spiritual Court may proceed to Deprivation; so in the Case of* Townsend *versus* Thorp, *for Deprivation cannot be in those Cases by the Common Law. Libel in Spiritual Court for Adultery; and in that Case no Prohibition lies, because no Punishment at Common Law for Adultery.* 2 Inst. 488. These are called *merè Spiritualia. Where a Libel is in Spiritual Court for calling the Prosecutor* Bawd, *no Prohibition, because not actionable at Common Law. But in all Cases where there is a Remedy given by Common or Statute Law, and no Saving of the Ecclesiastical Jurisdiction, the Conuzance of that Cause belongs to the King's Temporal Courts only.* Vide 1 Inst. 96. *Sir* Tho. Jones 131.

Y. C. J. The Libel in Question consists of several distinct Facts. It is for a clandestine Marriage,

Marriage, without Licence, at uncanonical Hours, and in a private Dwelling-House. These are not Circumstances merely descriptive of a clandestine Marriage, and constituting one and the same Offence, *but a distinct Judgment may separately be given upon each.* To marry under all these Circumstances was no Offence at Common Law, and are only made so by the Canons of 1603. *But these Canons have neither been confirmed by Parliament, nor allowed in Courts of Common Law; and Canons oblige not the Laity, without Consent of Civil Legislative Power.* There are two Questions; *1st*, Whether Bishop *Sancroft's* Constitution, which condemns clandestine Marriages, be confirmed in Parliament? And, *2dly*, If the Jurisdiction of the Spiritual Court is not taken away by 7 & 8 *W.* 3? *It is a general Rule, that where a Remedy is given by Common or Statute Law in the King's Temporal Courts, whether the Matter be Temporal or Spiritual, the Ecclesiastical Courts have no Jurisdiction, except there be a Particular Saving in the Statute for that Purpose.* But this Rule is not to be taken in an unlimited Sense; for where the Proceedings are *diverso intuitu, the Ecclesiastical Court shall not be prohibited.* The 7 & 8 *W.* 3. seems to be made with a particular Regard to the Revenue only, and the Words of the Act are very strong; "*For the better* "*Ascertaining, Levying and Collecting the said* "*Duties on Marriages and Licences, be it* "*enacted,*" &c. And then follows the Penalty for a Marriage without Licence, or Publication of Banns, but no Mention of a clandestine Marriage.

(153.)

Marriage. *This is a Matter of great Consequence*, and ought to be well considered before we give Judgment. *It is therefore proper to grant a Prohibition to declare upon, in Order to bring this Point before the Court by Way of Demurrer.* Vide *Carthew.* Prohibition to stay a Suit in the Spiritual Court against a Schoolmaster for keeping a School without Licence pursuant to the Statute, upon a Suggestion that the said Statute gives a Penalty of 40 *s. per diem* against every such Schoolmaster; and that by Law *nemo puniri debet bis pro uno delecto*; *& per Cur'*. A Prohibition was granted. *Carth.* 464. *Upon the like Motion it was held, that the Spiritual Court might proceed to punish, but not for the Penalty.* Adjournatur.

Carey *versus* Hinton, Mich. 7 Geo. II. *B. R.*

Trespass Quare clausum fregit. *Replication by the Plaintiff, that the* Locus in quo *was his Estate of* (154.) *Inheritance; not sufficient to maintain the Action.*

TRespass Quare Clausum fregit. Defendant, as to the Force and Arms, pleads *Not Guilty*; and as to the rest of the Trespass *he justifies, and says, That the* Locus in quo, &c. *was his own proper Lands, and that he entered into them as such.* Plaintiff replies, *That* Locus in quo *was his Estate of Inheritance, and his own proper Lands, and so concludes to the Country. Mr.* K. *moved in Arrest of Judgment, because the Issue was immaterial. The Replication is, that the* Locus, &c. *was the Estate of Inheritance of the Plaintiff; but that is not sufficient to intitle him to this Action: The Plaintiff may have an Estate of Inheritance in the Lands; he may*

may have a Remainder or Reversion in him; but to intitle him to this Action, he must have a possessory Property. Mr. *D. contr:*' The Issue is not immaterial, but unformal, *which is aided by the Statute of Jeofails*, as 5 *Rep.* 43. *Nichol's* Case. 2 *Bulst.* 41. *Moore* 464. 1 *Sid.* 289.

Y. C. J. *If this Issue should be aided by the Verdict, it will overturn all Certainty in Pleading.* The Replication is, that this is the Estate of Inheritance of the Plaintiff, *which may be true, and yet the Plaintiff not intitled to this Action*: He may have the Reversion or Remainder in him, which is not such an Estate as will support this Action. The Replication indeed does go something further; and avers these to be the proper Lands of the Plaintiff, but that imports no more than a Property in Lands, *not a possessionary Property to intitle him to this Action, but may be a Property in Remainder or Reversion.*

P. J. *The Issue is immaterial; he has not pleaded it as his Freehold and Inheritance*, but that the *Locus in quo, &c.* is his Estate of Inheritance. *He ought to have pleaded* liberum Tenementum; *but that cannot be supplied and aided by Verdict.*

L. J. *Liberum Tenementum means a Right of Entry, and may be given in Evidence upon Not guilty.* If the Words *in the Replication* would amount to the same Construction as *liberum Tenementum*, there is no Question but it had been good; but the Words import no more than a Property in the Lands, which may be in Reversion; but does not go so far as

as to shew *Possession, or Right of Entry in the Plaintiff.*

P. J. Dissentient', Adjournatur.

Shark *versus* Dilks, Mich. 7 Geo. II. *B. R.*

No Rule to plead necessary, where the Defendant has Time given him to plead by Rule or Order.

MR. *M.* Counsel moved *to set aside Judgment for Irregularity; and the Objection was, That the Plaintiff had signed Judgment without giving a Rule to plead. The Defendant had applied for further Time to plead, and by Consent had further Time given. The Defendant did not put in his Plea at the Time agreed, and thereupon the Plaintiff signed Judgment;* et per Cur. *Where further Time is given, a Rule to plead not necessary; and so denied the Motion.*

(155.)

Boucher *ver.* Lawson, Mich. 7 Geo. II. *B. R.*

Owner of a Ship held to Bail for the Default of the Master, on an Affidavit in the Disjunctive.

THE Defendant was arrested at the Suit of the Plaintiff in the Sum of 363 l. Mr. *B. moved to discharge him upon common Bail; and upon Affidavits the Case appeared to be this: The Plaintiff's Correspondent at* Lisbon, *5th* Nov. *Inst. shipp'd on Board the Ship* Little Job, John Fletcher *Master, (whereof the Defendant then was and now is sole Owner) Goods to the Value of* 363 l. *being* Moidores, *which the said Master undertook to deliver to the Plaintiff,* &c.

But

But the Defendant says, he gave no Authority to receive the same, for that the Goods being contraband Goods, his Ship was liable to be forfeited. John Fletcher *did not deliver the Goods according to Promise; whereupon the Plaintiff brought his Action against the Defendant, Owner of the Ship, supposing him answerable for the Undertaking of his Servant.* Mr. *B.* insisted upon 12 *Geo.* 1. *That Oath to be taken of the Cause of Action must be positive*; whereas, in the present Case, the Plaintiff had only swore that *John Fletcher* Master, or Defendant the Owner, were indebted to him in the Sum of 363 l. *which is in the Disjunctive and uncertain.* That *Moydores* being contraband Goods, it was unlawful in his Servant to receive them, and therefore the Master not liable.

That no Action will lie in this Case, *but Trover, or a special Action on the Case for not delivering Goods according to Agreement, and in both these Cases the Writ must be mark'd, or the Defendant cannot be held to special Bail*; and compared it to the Case of *Hughes* versus *Strout*, which was adjudged this Term. This was an Action for Breach of Covenant, and 100 *l.* Damages laid. The Defendant moved to be discharged upon common Bail, and so ruled by the Court, *because no Allowance by a Judge to have the Writ mark'd.*

Mr. *S.* Counsel *cont': We have not declared yet, so the Defendant cannot say what Action may be brought. We may bring* Assumpsit, *and in that Case the Defendant must find special Bail.* Vide 2 Salk. 440. Boson *versus* Sandford. Assumpsit *lies against the Master for the Undertaking*

Undertaking of his Servant. In the principal Case the Motion was denied, and the Defendant ordered to find special Bail.

Pasch. 8 Geo. 1. Laws *versus* Colton. *In Trover the Defendant was held to special Bail.* W. *mov'd to discharge him upon filing common Bail, because the Writ was not mark'd. The Motion was opposed.* Sed per Cur. *He must be discharged upon common Bail.*

(156.) The King *ver.* Dr. Bettesworth, Mich. 7 Geo. II. *B. R.*

Mandamus *to grant Administration on the Widow's Renouncing.*

EARL of *Suffolk* died intestate, leaving his Wife the Countess, and a Son, the present Earl of *Suffolk. The Countess renounced Administration* in scriptis *by Proxy*, and thereupon the Earl applied to the Spiritual Court for Administration, but was refused till such Time as the Countess had exhibited an Inventory of all the Goods belonging to the deceased Earl in her Possession, whereupon the present Earl applied to this Court for a *Mandamus.*

Dr. *J.* In Opposition to the Motion, insisted the Renunciation of the Countess was *enter'd by Surprise*; for before the Renunciation, *a Caveat had been entered by the Creditors*; *and it is a Rule in Ecclesiastical Courts, that after a Caveat no Act can be done, neither in granting nor Renouncing Administration before the Caveat be withdrawn.* So that in this Case the Renunciation is admitted, yet being by Surprise, and not *de jure*, no Reason to compel

compel the Spiritual Court to grant Administration to the Son. What is insisted upon in the Prerogative Court is only according to the Practice of that Court; *a Renunciation in Person is never admitted, but upon Oath that the Person renouncing has not imbezilled the Effects of the Intestate.* And this is in Favour of Creditors. The Spiritual Court has not absolutely refused Administration, but only till the Countess brings in an Inventory.

Mr. *M.* Counsel on the same Side, The Renunciation was admitted by Surprise, without Notice to the Creditors. The Manner of admitting Renunciation in that Court is, *upon Oath that the Person renouncing has not diminished the Goods of the Intestate, and upon Consideration of exhibiting an Inventory of the Goods of the Intestates in their Hands. Mandamus's* in these Cases are founded upon 21 *H.* 8, *c.* 5. *which leaves a Discretion in the Spiritual Court to grant it to the Widows or next of Kin, but in no Case was Administration granted to the next of Kin, but upon Condition to bring in the Widow*; and in those Cases Administration is never granted before the Widow brings in an Inventory. The Practice of every Court is the Law of every Court, and this Court will take Notice of it.

Y. C. J. *The Mandamus must go; the Act of Parliament is express, that Administration must be granted to the Widow or next of Kin: When therefore the Widow renounces, the next of Kin is entitled* ex debito justitiæ.

There is no Question but Creditors may enter (157.)
Caveats, but that is only to take Care that
Security

Security be given. The Spiritual Court will grant Administration upon the Countess's Exhibiting an Inventory; but when will that be? This is not compulsory upon the Countess to exhibit. Supposing therefore she should never exhibit, it seems unaccountable that this should prevent the next of Kin from having Administration.

If the Effects of the Intestate are imbezilled, the Administrator must take Care of that; he is intitled both in Law and Equity, and the Countess is accountable to him. But it is said always to be the Practice of Ecclesiastical Courts to have an Inventory, and therefore this Court will not interpose. This Objection is overruled every Day. *In the Case of Lord* Londonderry, *the Spiritual Court denied Probate before Commission of Appraisement was returned: And it was argued that this was the constant Practice of the Court; but where the Practice is contrary to the Rules of Law, this Court pays no Regard to it.*

P. and *L.* Justices, being of the same Opinion, *the Mandamus was granted.*

Mason *versus* Eall, Mich. 7 Geo. II. *B. R.*

Proceedings partly in Latin *and partly in* English, *no Error.*

ASSUMPSIT, and Verdict for the Plaintiff. Mr. *P.* assigned for Error, that the Proceedings being partly in *Latin*, *and partly in English*, *the Judgment was erroneous*, *as in* Comb. 50. Cro. El. 85. Declaration was in *English*; whereas, by 36 *Ed.* 3. *c.* 15. all Entries are to be in *Latin*; and altho' it was

was said the Custom there was so used, yet this cannot be good against a Statute.

Mr. R. *con': This is aided by the late Act of Parliament, which is express that no Judgment shall be reversed, where Proceedings are Part in* Latin, *and Part in* English. *The Words of the Act are,* "That it shall not be Error."

Per Cur', Judgment must be affirmed. *Vide* Ca. 130.

Wilmore *versus* Haughton, Mich. 7 Geo. II. *B. R.*

The Damages laid in the Declaration, and not those Damages found by the Jury, to govern on the Statute 5 Geo. 2. *For proceedings to be in* English *where the Cause of Action is under* 10 l.

(158.)

Y. C. J. *delivered the Opinion of the Court, that the* Damnum *in the Declaration must be the Measure of the Damages.* The Case of *Wilmore* versus *Haughton* was Trespass in Assault and Battery, and 40 *l.* Damages laid in Declaration; the Jury found for the Plaintiff, and gave 1 *s.* Damages. Error was brought upon this Judgment, and assigned for Error, that Damages being under 10 *l.* the Proceedings ought to have been in *English*, for that the Cause of Action was the Damage given in the Verdict. The next is the Case of *Thurston* and *Harris*, which was an Action of *Assumpsit*, *ad damnum* 20 l. There is Judgment by Default, a Writ of Inquiry executed, and 6 *l.* given in Damages. A Writ of Error is brought, and assigned, that Proceedings ought to have been in *English*. The next is the Case of *West* and *Nichols*, which was Trespass in Assault, *&c. ad damnum* 100 *l.*

100 *l.* there is Verdict for Plaintiff, and 40 *s.* Damages; Error is brought, general Errors are assigned, and insisted, that Damages being under 10 *l.* all the Proceedings ought to have been in *English*. It has been argued for the Plaintiffs, that the finding of the Jury is the Cause of Action, and that neither Party nor Court can say otherwise. On the other Side, it is said, that Damages in the Declaration is the Cause of Action. *Vide* 5 *Geo.* 2. *For that in Actions which found in Damage, the Plaintiff cannot prophecy* what Damage the Jury will find. *Under these Circumstances the Court is of Opinion, that the* Quantum *in the Declaration is to be the Measure of the Damages.* This Act of Parliament is introduced with a Recital of 12 *Geo.* 1. intitled, *An Act to prevent frivolous and vexatious Arrests, and by that Act the Cause of Action is to be taken from the first Process served upon the Defendant.* And in the same Act of Parliament there is another Clause, which relates to the Issuing out of Special Writs; and here the Cause of Action must necessarily be understood of the Demand laid in the Process, *or else the Officer may be an Offender* ex post facto, *for what he could not foresee. In pleading the Statute of Limitations, the Averment is* quod causa actionis non accrevit, &c. and Cause of Action in this Case relates to the Demand in the first Process. *Stat. Glouc. c.* 8. *Courts of* Westminster *shall proceed in no Cause, where the Cause of Action is under* 40 s. *but that must be taken from the Cause of Action laid in the Declaration.* 2 Inst. 311, 312. *So if Action is in an inferior Court, and the*

the Damnum *is under* 40 s. *tho' the Jury should give upwards of* 40 s. *yet the Plaintiff shall have his Judgment, and may release Damages above what is laid in the Declaration.* This Case would have had some Consideration, if it had depended singly upon this Act of Parliament; but it is now made clear beyond all Doubt, by an Act of Parliament *passed the last Sessions, intitled, an Act to explain* 5 Geo. 2. *and to extend it to the great Sessions of* Wales. Vide *the Act of Parliament. By this Act the* (159.) *Debt or Damage declared in the Process are Words synonymous to the Cause of Action mentioned in* 5 Geo. 2. *and therefore the Court is of Opinion, that the Judgments in these Cases in the* Common Bench *must be affirmed.* There is another Case, which is the Case of *May* versus *Osborne*, that is the Reverse to these; for there the Plaintiff declares in *English*, *ad damnum* 25 *l.* There is Judgment by Default, a Writ of Inquiry executed, and 9 *l.* 10*s.* Damages given. Error is brought, general Errors are assigned, and objected, that the Declaration being in *English*, the Judgment was erroneous. Both these Cases cannot be aided by 5 *Geo.* 2. and therefore this Case must stand upon the old Law, and there is no Question but then the Judgment is erroneous; for 36 *Ed.* 3. *c.* 15. expresly provides that all Entries shall be in *Latin. This Judgment therefore must be reversed.* Vid. ante Ca. 129.

Amcourt *ver.* Elever, Mich. 7 Geo. II. *B. R.*

Assumpsit. *Condition precedent.*

IN *Assumpsit.* The Plaintiff declares that the Defendant, in Consideration the Plaintiff had promised to assign him a Lease, he the Defendant, in Consideration thereof, promised to pay, *&c.* The Defendant pleaded that the Plaintiff had not assign'd, *&c.* and to this the Plaintiff demurs. The Question is, If the Assignment on Part of the Plaintiff is not a Condition precedent to the Payment of the Money by the Defendant. *Vide* 1 *Lutw.* 245. *Thorpe* versus *Thorpe.* 1 *Roll.* 415. 2 *Saund.* 156. *Hunlocke* versus *Blacklowe.* Stands over.

The King *ver.* Carter, Mich. 7 Geo. II. *B. R.*

Bail denied in Manslaughter found by the Coroner's Inquest.

THE Defendant was found guilty of Manslaughter by the *Coroner's Inquest*, and being brought up by *Habeas Corpus, moved to be bailed, having Affidavit that one of the Jury had laid several Wagers that the Coroner's Inquest would find the Defendant guilty. It appeared by the Inquisition, that* Carter *struck the Deceased without Provocation, which was the Occasion of his Death; and then it goes on, and finds him guilty of Manslaughter.*

Cur': This is the Evidence upon which the Inquisition was taken, and by the *Circumstances of the Fact the Defendant appears to be guilty*

guilty of Murder. As to his Objection to the Jury, *that may be a proper Defence for him upon his Trial: But we cannot enter into the Merits upon Affidavits; and therefore denied him Bail.* (160.)

Greeting *ver.* Allcock, Mich. 7 Geo. II. *B. R.*

Latitat *to the Chamberlain of* Chester.

THE Plaintiff sued out a *Latitat*, directed to the Chamberlain of the County Palatine of *Chester*, which he served upon the Defendant, *without any Mandate from the Chamberlain*, which was now complained of *as irregular, and Motion made to set aside Proceedings. Before* 12 Geo. 1. *the King's Process did not run into the Counties Palatine, and therefore was always directed to the Chancellor, who made out his Mandate directed to the Sheriff to execute the same.* 4 Inst. 212. This Act of Parliament does not take away the Jurisdiction of Counties Palatine; but, in general, that no Arrest shall be made where Debt is under 10 *l.* *In* 5 Geo. 2. *Which is made in Explanation of the former, there is a particular Clause to save the Jurisdiction of Franchises and Liberties, that in all Franchises,* &c. *particular Officers shall execute the Process.*

Mr. *F. con':* The Act of Parliament mentions Process only issuing out of superior and inferior Jurisdictions; *but a Mandate issuing out of no Court at all*, it is no more than the common Case of a Sheriff: Where Process is to be executed in a particular Franchise, *the*

Sheriff makes out the Warrant to the particular Officer; and tho' in these Cases the Mandate is under Seal, that makes no Difference. Since the Making this Act, no Warrant is now made out by the Sheriff, but Copy of the Process is served in the first Instance. The Stat. 5 *Geo.* 2. makes no Difference, but is rather in Favour of the Plaintiff, for this Act is relative to 12 *Geo.* 1. and the Words are, "*That Affidavit* "*must be made before the Judge or Commis-* "*sioners of that Court out of which such Process* "*issues.*" And the Act requires Service of such Process issuing out of inferior Courts, and the Person executing such Process shall take no more than 5 *s.* for Service of such Copy: *But if a Mandate be necessary, more may be taken, for that is* casus omissus *in the Act of Parliament.* Proviso *in the Act of Parliament makes no Difference, but only that in particular Franchises and Jurisdictions the Process must be executed by the proper Officer. If this Clause had not been included, an Attorney, or any other Person, might have served the Copy of the Process; but to save the Profits arising to the Lords of these particular Jurisdictions, was the Reason of adding that Clause.*

(161.) *Y.* C. J. The Nature of the Process to be served runs thro' both Acts of Parliament, and the Service (of such Process) is relative to the Process which originally issues; *but a Mandate is not Part of that Process issuing out of the same Court.*

P. J. The Word *Process* in the first Act extends to the original Process out of this Court, and the Word (*such*) makes it stronger: Besides

Besides, there must be a Return of Process. *What Process? That which issues out of this Court.* The *Proviso* in the second Act of Parliament does not go so far as is contended for. It was never the Meaning of the Legislature to have Proceedings below run in the same Chanel as before the Act of Parliament. *The Proviso is to preserve the Lord's Profit arising from his particular Franchise, that the Process issuing out of this Court should be served by the particular Officer of that Franchise.*

P. J. Copy of Process to be served within the meaning of both these Acts of Parliament, must be the original Process issuing out of superiour Courts. The Chamberlain's Mandate is not to be looked upon as a Process, for his Office is partly Ministerial. This Act was made to prevent Charge and Expence in the Execution of the Process, that a Copy of the Process may be served without the Interposition of the Sheriff. If a Mandate should be necessary, the Act of Parliament will be of little Benefit; and as the Sheriff's Profit is taken away as to the Service of Writs, so would the Lords of particular Franchises have lost theirs, but for the saving of the Act of Parliament.

L. J. This Case depends upon the Construction of the first Act of Parliament, and is not aided by 5 *Geo.* 2. the Clause concerning the Service of Process, is relative (such Process) and can be no other than the original Process issuing out of this Court. *Motion overruled by the Court.*

The

The King *versus* Earbury, Mich. 7 Geo. II. *B. R.*

Recognizance taken by a Justice of Peace to appear in this Court to answer all Matters generally, not specifying the Facts.

(162.)

THE Defendant was arrested by Virtue of a Warrant signed Charles Delafay, *being charged as Author of a Libel, called* The Royal Oak Journal, *and by Recognizance bound to appear at the* King's Bench *Bar the first Day of the next ensuing Term, and there to answer all such Matters as he should be charged with from the Bar. Mr.* Earbury *came into Court the Term following, and objected to the Legality of the Warrant, and of the Recognizance, but refused to have his Appearance recorded; notwithstanding the Clerk recorded his Appearance, being then present in Court.* Mr. *J.* Counsel for the Defendant, insisted, That altho' Mr. *Earbury* did appear in Court, yet the *Court could not record his Appearance against his Consent*, Goldſ. 118. which was in the Case of a Prisoner; here the Defendant is not so. The Court entered the Presence of the Defendant, but would not enter his Appearance. *Essoin* does not enter Appearance, only an Excuse for not appearing. 4 *Jac.* 2. *The King against the Archbishop of* Canterbury. *The Archbishop was committed by the Privy Council upon a Libel, called a Petition of Remonstrance to the King not to intermeddle with Church-Government.* And it was objected to the Commitment, That the Bishop could not be charged with an Information, unless properly and legally in Court. 47 *Ed.* 3. Tit. *Annuity.* 1 *Sid.* 32. *Judgment ought*

ought not to be given because no Appearance, and the Bond is only a Promise to the Sheriff to appear, Lutw. 951. *unless there be Process, and Party have a Day in Court, he cannot appear; and this Recognizance is no Process to bring the Party into Court. Recognizance, illegal in Form and Substance! The Condition is, if the said Mr.* Earbury *shall appear in* B. R. *to answer such Matters as shall be objected to him at the Bar, but nothing then charged upon him.* This is too general, for the Recognizance should have mentioned the Facts he was obliged to answer. *Lamb.* 89. *Dalton,* Tit. *Recognizance*; and the Practice is always to express the Cause, *Godb.* 147. *Acts c.* 25. *v.* 7. Festus *said to* Agrippa, *concerning* Paul, *For it seems to me unreasonable to send a Prisoner, and not within to signify the Crimes laid to his Charge.* Recognizance bad in Substance, *for Justices of the Peace have no Power to bind any one to his Appearance into this Court.* They have only an inferior Jurisdiction, and their Proceedings cannot be brought into this Court but by *Mandamus, or other legal Process issuing out of the Court.* This is a Court of the greatest Dignity, see 4 *Inst. Form of a Recognizance is to appear* coram me, *but does not say before whom by Name.* Un' Justiciar' *&c. Objection to Commitment, that it was to a Messenger's House, which is no Prison in Law, and therefore illegal. Recognizance obtained by Duress, therefore void.* Cro. Eliz. 646, 745. Magna Charta, c. 29. 25 Ed. 1. c. 1. & 2. *No Examination,* Dalton, c. 170. *No Warrant produced, Vide* 1 Salk. 347. *Kendal* and

Roe

Roe, 5 Mod. 78. same Case. *Commitment for High Treason in aiding the Escape of* H. *committed for Treason, ought to specify the Treason for which* H. *was committed.* 1 Leon. 70, 71. *Secretaries of State may commit as Conservators of the Peace at Common Law.* 1 Salk. 347. (163.) *May commit to a Messenger, for the Court will intend it only in Order to carry him to Gaol.* 1 Salk. 347.

The King *versus* Gallard, Mich. 7 Geo. II. *B. R.*

Indictment contra bonos mores.

INDICTMENT contra bonos mores, *for running in the common Way naked down to the Waist, the Defendant being a Woman.* S. *moved to quash, because the Fact is not indictable.* F. cont': Indictments will lie *contra bonos mores*, as against *Curle for publishing an obscene Book.* 1 Sid. 168. Sir *Charles Sidley's Case.* 1 Keb. 620. Quia immodeste & irreverenter *behaved himself in Church. Another Indictment was for printing* Rochester's *Poems*; sed per Cur', *The Indictment must be quashed, for nothing appears immodest or unlawful.*

Chapman *versus* Brown, Mich. 7 Geo. II. *B. R.*

In Assault and battery, and Costs for not going to Trial.

ACTION of Assault and Battery, and Costs for not going on to Trial. The Plaintiff brought a fresh Action, and now Mr. S. moved to

to stay Proceedings till the Plaintiff had paid the Costs of the first Action, and produced an Affidavit that the Plaintiff was gone beyond Sea, so that if the Verdict should be for the Defendant, no Person to come against for Costs. The Court said this Motion was against the general Rule; but the Plaintiff being beyond Sea, did vary the Case, and therefore ordered to search Precedents. Mr. S. then turned the Motion, that the Attorney might shew by what Authority he prosecuted this Action, contrary to the express Command of the Plaintiff; but this the Court absolutely refused. At another Day Mr. S. stirred this again, and cited the Case of a Pauper; *but the Court said that did not come up to the present Case, and remembered the Case of* Knock *versus* Wilkins, *which was an Action of Assault and Battery, and like Motion was denied. The Attorney for the Plaintiff afterwards entered into a Rule by Consent to pay Costs, if the Plaintiff should be nonsuited, or a Verdict against him.* Note; *In the Case of* Jones *versus* Eubank, Mich. 3 Geo. II. *the like Motion was made, and granted* per Cur'.

A fresh Action brought, and the Plaintiff gone beyond Sea; the Court refused to stay Proceedings till Costs paid.

Murray *versus* Anderson, Mich. 7 Geo. II. *B. R.*

(164.)

TRespass for entering into the Plaintiff's House and taking two Shirts; *and the Defendant justifies, for that the Plaintiff was fined the Sum of* 3 s. *and that he entered and took the Goods in order to satisfy this Fine, and thereupon*

Justification in Trespass.

thereupon the Plaintiff demurred. And it was now objected, that the Plea was uncertain; for it does not appear how this Fine was imposed, only said in general, that the Plaintiff was fined, without saying where, by whom, by what Authority, or for what Offence: All that is said is, that this Fine was allowed in the *Exchequer Chamber* upon the Sheriff's Account, to be due to the chief Bailiff of the Manor of *Stepney*; but it is not said that it was due to him as chief Bailiff.

Cur': It is said to be allowed him upon the Sheriff's Account and upon the Roll in the *Exchequer*, the Entry is always general. It appears by the Plea, that the Defendant was fined, and that the Goods were levied accordingly.

Bainton *versus* King, Hil. 7 Geo. II. *B. R.*

Lord *Hardwicke*, Chief Justice.

Page, *Probyn*, *Lee*, } Justices.

Debt upon Award.

DEBT upon Award. The Defendant pleads *no Award.* The Plaintiff replies, and sets out *an Award, that the Defendant should have all his Goods taken in Execution, except those which were already sold; that he should thereupon pay so much Money to the Plaintiff, and all Parties should execute mutual Releases.*

To

To this the *Defendant demurs*, and objected, that this Award was made on one Side only, for that the Defendant could have no Benefit of the Award, and cited 3 *Mod. Rep.* 272. *Thirsby* versus *Helbot*. It is uncertain what Goods the Defendant was to have again, and not in his power to know what were sold, and what were unsold at the Time of the Award.

S. Counsel *con'*: Here are mutual Releases to be executed, which makes it a good Award; *for if I am to pay Money, and another is to release, this is a mutual Award.* The Defendant is to have all and singular the Goods which remain unsold; and this is a sufficient Ascertaining of the Goods, by Reference to the Goods taken in Execution. It is like the Case of *Taxing Costs, or Awarding an Account, for in both Cases what is due may be reduced to a Certainty.* (165.)

H. C. J. Awards have of late been more favoured than formerly; and therefore, if by any favourable construction this can be reduced to a Certainty, the Court will intend it a good and sufficient Award. Here is something awarded *extra* the mutual Releases, and if either Party cannot have the Benefit of it, it is a void Award. Here are goods to be restored to the Defendant, except such as are sold: How does the Defendant know what goods remain unsold? what these Goods are that were sold, and *whether sold* bonâ fide *may be disputed*; and so many other Objections may arise, that this Award is by no Means conclusive between the Parties. *Adjournatur*, to be spoke to again.

A

A Man shall not reverse a Judgment for Error, unless he shews that the Error was to his Prejudice. 5 Rep. 39 b. in Tey's Case.

The Bank of England *versus* Morice, *Executrix of* Humphrey Morice *deceased*, Hil. 7 Geo. II. *B. R.*

Amendment of Replication, after a Rule for a Trial de novo.

IN *Assumpsit* against the Defendant, as Executrix of *H. M.* deceased, the Defendant pleaded several Specialties standing out against her Testator, and set out Bonds specially, and disclosed particularly what was in Reality due thereupon, and that she had not Assets *ultra*. The Plaintiffs replied Assets *ultra*; and upon this they were at Issue.

Upon the Trial a Question arose whether the Penalty in the Bonds, or so much only as was disclosed by the Defendant to be really and *bonâ fide* due thereon, should be allowed to cover Assets.

There was a Verdict for the Plaintiffs, *&c.* for 28000 *l.* and upwards given in Damages; but *R.* C. J. saved this Point to the Defendant, and afterwards, upon Argument, the Court being of Opinion that the Penalty was the Debt in Law, a Trial was granted *de novo*.

(166.) *E.* Serjeant came this Term into Court, and prayed to amend the Replication, and that instead of replying Assets *ultra*, the Plaintiffs might reply what was really due upon

upon the Conditions; That the Obligees were willing to accept thereof, and that the Defendant kept the Bonds on Foot *per fraudem*. Upon shewing Cause it was objected, That Courts of Law had never gone so far; that this was not to amend the Replication, but was making it an intire new Issue. *Salk.* 50.

If this Practice prevails, there will be no Occasion to discontinue or pray a Repleader.

In all Cases where Applications of this Nature have been made, it has been under this Circumstance, "If it can be no Prejudice to the Defendant." Here it may be the greatest Prejudice; for the Plaintiffs have not stirred in this Action for now almost a Year and a Half, and the Defendant has paid away Assets recovered upon Suits commenced since the Commencement of this Action; and therefore it will make a *Devastavit*, if the Plaintiffs recover in this Action, and there appears to be a Defect of Assets.

H. C. J. There is no Question, but after a Trial *de novo* is granted, an Amendment may be made which does not alter the Nature of the Issue: But here the Question is, Whether an Amendment can be made which intirely alters the Issue?

E. Serjeant *e con'*: This Amendment makes no Alteration in the Nature of their Plea, nor in the Issue: For the Question in Substance will be, Whether she has Assets *ultra* what was really and *bonâ fide* due upon the Specialties?

There are several Cases where Amendments of this Nature are made after Issue joined; but

but the Case of *Thompson* against *Hunt*, 3 *Lev.* 368. is a Case in Point. 1 *Leon.* 24. *Cro. Jac.* 306. 1 *Sid.* 412. So is 3 *Lev.* 347. and 3 *Lev.* 440. the Case of *Stephens* versus *Cooper*, 3 *Lev.* 20. *Dobson* versus *Douglas.*

There was a Case lately adjudged in this Court, which seems to go further than the Case in Question, and that is the Case of the *Executors of the Duke of Marlborough* against *Wigmore*, Hil. 4 Geo. II. In *Assumpsit* the Plaintiffs declared upon a Promise made to the Duke of *Marlborough* in his Life-time; the Defendant pleaded *non Assumpsit infra sex Annos*, and upon this the Parties were at Issue, and the Cause was carried down to Trial. The Plaintiffs afterwards prayed to amend, by laying the Promise to be made to the Executors themselves, and the Court upon Consideration made a Rule accordingly.

H. C. J. conceived this Amendment is not consistent with the Rules of Law, nor with the Rules of this Court. This Amendment is no Part of the Rule itself, and there is no (167.) Question, when the Court made the Rule, it was in the Power of the Court to put what Terms upon it they thought proper. I am of Opinion this Motion cannot be granted, for it is not so properly a Motion to amend, as to withdraw the Replication intirely, and make a new Issue; this is indeed a common Practice in Equity, but I never knew it to prevail in a Court of Law. The Case of *Thompson* and *Hunt* does not go so far as the present Case: In that Case the Plaintiff alledged in his Replication, that there was only so much really due

due, but had omitted that the Obligees were willing to accept the same, and the Adding these Words did not alter the Plea: But that Case seemed to go farther than any Case he said he ever heard of, and seemed contrary to Law to grant a Repleader after Judgment in Demurrer, and questioned if that Case was not upon Consent. *Vide* 3 *Rep.* 52 *b.* in *Rigeway*'s Case, 1 *Anderf.* 166. 1 *Leon.* 79. *c.* 102. *Zouch* versus *Bamfield. Plow.* 138. *Browning* versus *Beston. There was a Repleader after Demurrer.*

The Duke of *Marlborough*'s Case does not come up to the present Question: The Amendment in that Case did not vary the Fact, nor alter the Record, but the Issue continued as it was before.

The Circumstances of this Case are very much to be considered; this is in Case of an Executor, *where Priority of Suit prevails*; the Plaintiffs having lain by a Year and upwards, it may reasonably be supposed, that the Defendant imagined the Cause to be intirely dropt, and that she has paid away the Assets; it would therefore be a little hard, that the Defendant should be prejudiced by the *Laches* of the Plaintiff's, especially in this Case, where the Rules of Law seem so strongly to favour her.

P. P. and *L.* Justices being of the same Opinion, the Motion was denied. *Denied.*

Arthur

Arthur *versus* Vanderplank, Hil. 7 Geo. II. *B. R.*

Covenant for Rent against the Executor of a Lessee, where the Lessee in his Lifetime had assigned his Term, and the Lessor had (168.) *accepted the Assignee for his Tenant.*

ACTION of Covenant for Rent against the Defendant, Executor of *J. S.* Lessee for Years. The Defendant pleads, that the Lessee in his Life-time made an Assignment of his Term, and that the Plaintiff, the Lessor, had received Rent, and accepted the Assignee for his Tenant; and to this the Plaintiff demurs.

B. Serjeant argued against the Plea, that it was bad. It is true, in an Action of Debt for Rent, this is a good Plea, 3 *Rep.* 22. *a & b. Walker*'s Case; but in Action of Covenant it is otherwise. *Cro. Car.* 188. 1 *Jones* 183. *Stiles* 265.

Mr. *P.* of Counsel with the Defendant, gave up the Point without Argument, and so Judgment was given for the Plaintiff.

Note; *Covenant lies not against Executors by Reason of the general Covenant in Law, by Virtue of the Words* Demise and grant; *but it is otherwise upon an express Covenant.* Dyer 257. 2 Brownl. 214.

Covenant lies against the Lessee after Assignment, although the Lessor had Notice and accepted Rent of the Assignee. 3 Lev. 233. Edwards *versus* Morgan; but not Debt.

Stephens

Stephens *ver.* Stephens, Hil. 7 Geo. II. *B. R.*

(N. B. *This Case was sent out of Chancery, for the Opinion of the Judges of the Court of King's Bench.*)

Of executory Devises.

SIR *William Stephens* being seized in Fee of several Freehold Messuages, Lands and Tenements, devised them in the Manner following; "I give and devise to my Grandson "*William Stephens*, after the Decease of my "Wife *Susanna*, all my Lands settled on my "said Wife for Life; and also all my Lands, "Tenements and Hereditaments in *Deptford* "in the County of *Kent*, settled upon me by "Deed by my Wife, to hold to me and my "Heirs for ever.

"*Item*, I give and devise to my said Grand-"son *William Stephens* all my Lands and "Tenements in the Parish of St. *Mary Ber-"mondsey* in the County of *Surry*, situate and "being at *Rotherith Wall*, *East Lane*, St. "*Mary Magdalene* Church-yard, *&c.* to hold "my said Messuages, Lands, Tenements, *&c.* "to my said Grandson *William Stephens*, his "Heirs and Assigns for ever. But, in case "my said Grandson *William* happen to die "before he attains his Age of twenty-one "Years, then I give and bequeath to my "Grandson *Thomas Stephens* all my Messuages, "Lands and Tenements before mentioned, as "well as those in the Parishes of St. *Mary* "*Magdalene Bermondsey*, and St. *Olive* in

" *Southwark*, as those in the Counties of *Essex*
" and *Kent*, to hold the same to my said Grand-
" son *Thomas*, his Heirs and Assigns for ever.

" But if my said Grandson *Thomas* should
(169.) " happen to die before he attains the Age of
" twenty-one Years, then I give and bequeath
" all my said Lands, Tenements, *&c.* before-
" mentioned, to such other Son of my Daugh-
" ter *Mary Stephens* by my Son-in-Law *Thomas*
" *Stephens*, as shall happen to attain his Age
" of Twenty-one Years, his Heirs and Assigns
" for ever; the elder of such Son to take
" Place before the younger, one after another,
" in Seniority of Birth, *&c.* and of the several
" and respective Heirs Male of such respec-
" tive Bodies of all and every such Son
" and Sons; the elder of such Sons, and
" the Heirs Male of his Body lawfully issu-
" ing, to be always preferred, and to take
" Place before the younger of such Sons and
" the Heirs Male of his and their Body and
" Bodies issuing: And for Default of such
" Issue Male, then I give and devise my
" aforesaid Freehold Estate, *&c.* to all and
" every the Daughter and Daughters of my
" said Son *Thomas Stephens*, on the Body of
" my said Daughter *Mary* to be begotten, and
" to the Heirs of the Body and Bodies of all
" and every the said Daughter and Daughters,
" as Tenants in Common, and not as Joint
" Tenants: And for Want of such Issue, then
" I give and bequeath my aforesaid Freehold
" Estates, *&c.* to my Brother *Richard Stephens*,
" his Heirs and Assigns for ever.

" *Item*, All the rest and Residue of my
" Estate

" Estate, both real and personal, Goods, Chat-
" tels, *&c.* whatsoever and wheresoever, not
" hereby before bequeathed, I give and be-
" queath the same to my said Son *Thomas*
" *Stephens*, his Executors, Administrators and
" Assigns for ever;" and made his said Son, *Thomas Stephens* his sole Executor.

15th *March* following the Testator died, leaving *Mary* the Wife of the said *Thomas Stephens* his Daughter *and Heir*, and his two Grandsons *William and Thomas Stephens*, living at the Time of his Death, but no Grandaughter.

18th *May* 1713. *Susanna*, Daughter of the said *Thomas* and *Mary Stephens*, was born, and is still living.

24th *October* 1714. *Thomas Stephens* the Grandson died *sans Issue*, and under the Age of twenty-one Years.

14th *September* 1718. *William Stephens* the Grandson died without Issue, and under the Age of twenty-one Years.

14th *March* 1719. *Mary Stephens*, another Daughter of *Thomas Stephens* and *Mary* his Wife, was born, and died *sans Issue* and under Age, 26th *October* 1722.

13th *November* 1721. *Sarah*, another Daughter of *Thomas* and *Mary Stephens*, was born, and is yet living.

15th *February* 1722. *Mary Stephens*, another Daughter of *Thomas* and *Mary Stephens*, was born, and died without Issue and under Age, 26th *April* 1723.

12th *January* 1727. *Thomas Stephens*, one (170.)
of the Parties in this Suit, Son of the said

Thomas and *Mary Stephens*, was born, and is still living.

Richard Stephens, to whom the Testator devised the Remainder in Fee, is still living.

Thomas Stephens the elder claims Title to the said Premisses, as residuary Devisee.

Mary, his Wife, claims Title as sole Daughter and Heir to Sir *William* the Testator; and the other Parties likewise claim Title under the said Testator's Will.

Peere-Williams, Counsel for the Infant *Thomas Stephens*.

The present Question as to *Thomas* the Infant is, Whether he will not be entitled if he attains the Age of twenty-one Years? The Testator devises his Lands, *&c.* to his two Grandsons *William* and *Thomas*, and in case they happen to die before they attain the Age of twenty-one Years, then to such other Son and Sons of his Daughter *Mary*, *&c.* as shall attain the Age of twenty-one Years. The Intention of the Parties in all Cases, especially in that of Wills, is to be regarded, if not inconsistent with the Rules of Law. *Hob.* 277. Here the Testator's Intention appears evidently, that his Grandsons should be first successively intitled to his Estate; and that his Grandaughters should not take but upon Failure of Issue Male. The first Devise to his two Grandsons *William* and *Thomas*, is a Devise absolutely to them in Fee; but the subsequent Words restrain and reduce it to a Fee-simple determinable, *viz.* if they attain the Age of twenty-one Years; but if they should die before that Time, then the Testator devises it to such other

other Son as *Mary* ſhould have, *&c.* when he ſhall attain his Age of twenty-one Years. Theſe Words make a good *executory Deviſe to* Thomas *the Infant*, to take Effect in Poſſeſſion, as ſoon as he comes of Age.

It cannot be thought that the Teſtator intended to give a leſs Eſtate to the next Son that ſhould afterwards be born, than he gave to his two Grandſons *William* and *Thomas* then in Being.

Limitations by Way of executory Deviſe operate in the ſame Manner with ſpringing Uſes in Equity; and the Statute of Wills impowers the Teſtator to deviſe his Lands according to his Will and Pleaſure: But this Power has always been conſtrued ſo as to avoid Perpetuities, that both executory Deviſes and ſpringing Uſes muſt ariſe within a Time limited. In the Caſes of Executory Deviſes, a Fee may be limited upon a Fee, and the Teſtator may limit it to as many Sons, one after another ſucceſſively, as *Mary* and *Thomas* ſhall have of their Bodies; and all this makes no Perpetuity, becauſe confined to a Time limited, and to ariſe within the Compaſs of one Life. One ſeized in Fee may not (171.) only deviſe his Eſtate upon a Contingency, but upon Failure of that Contingency may deviſe it over upon another Contingency likewiſe; as in the Caſe of a Term for Years, a Man may deviſe it to one for Life, Remainder to another for Life, and ſo on; for all being to ariſe within the Compaſs of a Life, there can be no Danger of a Perpetuity. In the preſent Caſe, the longeſt this Contingency can remain in

in Suspence is twenty-one Years. It is possible *Thomas* the Infant may die within Age, and after that another Son may be born; afterwards *Mary* may die, and so the Estate continue in Contingency till the second Son arise to twenty-one; but this is only during the Infancy of one who is to take, and is a reasonable Time for an Executory Devise to wait.

Suppose the Devise had been to the next Son which *Mary* should have, that without Doubt had been a good Executory Devise; for Executory Devises are not confined to Lives in Being; and therefore if a Term be devised to one for life, Remainder to the first unborn Son of such Devisee, this is a good Devise. 1 *Roll. Abr.* 612. 1 *Sid.* 451. Admitted nothing vested in *Thomas* before he attained the Age of twenty-one, but this makes no Perpetuity, because it must arise within twenty-one Years, or not at all. A Perpetuity is a Limitation to Persons not *in esse*, to arise upon a future Contingency, beyond the Time circumscribed by Law, and not to be dock'd and defeated by any Act to be suffered or done by the Tenant in Possession. But the Law allows of Limitations to arise within the Compass of a Life, or Lives in Being, or within the Term of twenty or thirty Years; and therefore a Limitation to *A.* when he shall attain the Age of twenty-one Years, is good. So if a Man enfeoffs an Infant upon Condition that he shall not alien, this is good to restrain Alienations during his Minority. 1 *Inst.* 224. *a.* And if in such Case the Infant suffers a Recovery, he may avoid it afterwards by Virtue of the

the Condition: So if an Infant levies a Fine, it shall bind him, if not reversed during his Infancy; but where he is restrained by Condition, he shall avoid the Fine, after he comes of Age; and yet it cannot be pretended that the Condition in that Case tends to create a Perpetuity. This Executory Devise is to arise within the proper Time prescribed by Law. 2 *Vern.* 151. *Martin* versus *Long.* 2 *Vern.* 86, 87. *Paulet* versus *Dogget.* 3 *Leon.* 65. *Hinde* and *Lyons*, 1 *Salk.* 229. 1 *Vern.* 304. *Massenburgh* versus *Ash.* 2 *Chan. Rep.* 202. *in le Case.* This last is a Case in Point, and answers all Objections that can be made in the present Case; and there is no Difference, but that was in the Case of a Deed, and this here is in the Case of a Devise, which makes it stronger for our Purpose. The Case of *Blue* versus (172.)
Marshal, *August* 1732. goes further than the Case of *Massengburgh* ver. *Ash.* *J. B.* devised his personal Estate, consisting of Leases for Years, and some Money, to his Daughter *Anne*, and after to such Children as should be born of her Body, and she should leave at the Time of her Death, when they attained the Age of twenty-one, and upon Failure of such Issue, Devises over. *King*, Chancellor, decreed this a good Devise to the Children, and that the Intention of the Testator in the Case of Wills was always to be regarded; and so long as there was such a Case as *Massengburgh* versus *Ash* to favour the Devise, he could not decree against it.

This Case is stronger than the Case in Question; for there the Children could not take

take till after the Death of the Mother; here *Thomas* is to take as soon as he attains his Age of twenty-one, notwithstanding *Mary* his Mother should then be living. There is no pretence to say that this Limitation shall go by Way of Remainder; for a Fee cannot be limited upon a Fee by Way of Remainder; Should this be construed to operate by Way of Remainder, it is certainly void; *for a Remainder must vest during the particular Estate or* eo instanti *that it determines.* 1 Rep. *Archer's* Case. It may be a Question, whether *Thomas*, when he comes of Age, will take a Fee, or an Estate-Tail? The first Words are, "*To him and his Heirs;*" but then follows the Words, "*And for Want of* "*such Issue,*" which may restrain the Limitation to an Estate-Tail. But, be it Fee, or be it Tail, it is a good Devise to *Thomas*, and will vest in him, when he attains the Age of twenty-one Years.

W. Serjeant, Counsel for the Daughters *Susanna* and *Sarah:* This Devise to *Thomas* the younger is void; for as an Executory Devise it cannot be good, because not to arise within the Time prescribed by Law; and as a Remainder it cannot be, because the two first Devisees, *William* and *Thomas*, dying before they came of Age, and before the Birth of *Thomas* the younger, the Estate vested in *Susanna*, who was then living and took the Whole by Purchase, which could not afterwards be devested upon the Birth of *Thomas* the younger. It is an established Rule in Law, *That where a Devise is limited by Way of Remainder*,

Remainder, and in Effect may operate as a Remainder, it cannot take Effect as an Executory Devise. 2 Saund. 388. Carth. 310. Comb. 252.

The Construction of Wills is to be taken favourably according to the Intention of the Testator; and the several contingent Remainders are to be considered as having Relation one to the other, each to vest as they first come *in esse*, before the *Stat. H.* 8. If (173.) one had devised his Land by Virtue of a Custom, the Common Law accepted his Intent, without requiring particular Words of Limitation; as in Cases of Conveyances at Common Law: And as it was so in Devises before the *Statute*, *a fortiori* it ought to be so in Devises since the Statute. 1 *Salk.* 237. 2 *Mod.* 209. The Limitations in this Case to his two Grandsons, *William* and *Thomas*, make an Estate-Tail; for the Devise to them is to be coupled with the subsequent Words, "*And for Default of such Issue*;" so that, notwithstanding by the first general Words (*to them and their Heirs for ever*) they took a Fee absolutely, yet the subsequent Words (*and for Default of such Issue*) so qualify and explain them, that they create only an Estate-Tail. If the Devise had been to *William* and his Heirs for ever, and after to *Thomas* and his Heirs for ever, and if he dies *sans* Heirs, then to such other Son of the Body of *Mary*, *&c.* it had been clear in that Case what Heirs the Testator meant, *viz.* the Heirs of their Bodies, and so had been an Estate-Tail only. *Cro. Jac.* 416. *Bridg.* 84. *Cro. Jac.* 448. 3 *Lev.* 70,

70, 71. 1 *Salk.* 233, 234. 1 *Lutw.* 810, 813. These Cases shew, that dropping the Words (*when they attain the Age of twenty-one Years*) *William* and *Thomas* would have taken Estates-Tail only. *Hob.* 65. *Cro. Car.* 185. *Spalding* and *Spalding*. 9 *Rep.* 128. for the Whole of the Will is to be considered together, and construed according to the Intent of the Testator; and these subsequent Words, *viz.* (*if they should attain the Age of twenty-one*,) make no Difference; for it cannot be presumed, that if either of them died before that Age, that their Estate should cease at all Events, but if they died before that Age without Heirs of their Bodies; as in *Cro. Car.* the Case of *Spalding* versus *Spalding*. *Cro. Eliz.* 525. *Moore* 422. 2 *Lev.* 162. *Tilly* versus *Collier*. These Words to be rejected rather than the Devise to be construed to be void. *Hob.* 65. 6 *Mod.* 112. and in *Cro. Eliz.* 525 the Case of *Soulle* and *Gerrard*. If therefore the Devise in the present Case to *William* and *Thomas* makes an Estate-Tail, then upon the Death of *William* the Estate vested in *Susan* by Purchase, and cannot after be devested, tho' *Thomas* should live to attain the Age of twenty-one Years. As to the Claim of *Richard*, the Remainder-Man, of one entire Third by the Death of *Mary* the elder, and another Third of the other two Parts by the Death of *Mary* the younger; if he has any Claim, it must be of the whole Estate; for so long as there is one of the Daughters living, or any Issue Male of their Bodies, he cannot claim a particular Part only. For it is

to

to be obſerved, that upon every Limitation all his Lands are deviſed over, not in Part and by Fractions, but one intire Deviſe of his whole Eſtate to every the Daughter and Daughters, *&c.* and to the Heirs of the Body and Bodies of all and every ſuch Daughter and Daughters; and for Want of ſuch Iſſue, *i. e.* by any one of them, that then all his Lands ſhould go and remain to his Brother *Richard:* And in this Caſe the Daughters *Suſan* and *Sarah* cannot be Tenants in common, becauſe upon the Death of *William* the whole veſted in *Suſan*; and therefore *Sarah* cannot take as Tenant in common with her, but ſhall have one intire Remainder of the Whole; ſo that while there is any one Daughter, the whole cannot go over to *Richard*; for all the Daughters may take ſucceſſively in Courſe of Remainder, as in the Caſe of *Tilly* verſus *Collier*, 2 *Lev.* 162. 1 *Ventr.* 224. *Dyer* 303. *b.* A Deviſe in ſuch Caſe to the Daughters make croſs Remainders, and tho' not by expreſs Words, yet it muſt be by a neceſſary Conſtruction in Law. An Executory Deviſe when executed is to be conſidered as an original Deviſe; and therefore if the Deviſe to *Thomas* be good, and is to veſt at his Age of twenty-one, the Contingency is then at an End, and the Daughters will have Remainders expectant upon his Eſtate-Tail. (174.)

E. Serjeant, for *Richard* the Remainder-Man in Fee: The Deviſe to *William* and *Thomas* is a good Deviſe to them upon this Contingency when they attain the Age of twenty-one; but the Deviſe over to the other Son, there being no other Son at that Time in Being,

Being, is meerly void, not being limited to arise within the Time appointed by Law for Executory Devises to vest in: Upon the Death therefore of *William*, the whole Estate vested in *Susan*, *sub modo*, *i. e.* until the Birth of another Daughter, and then it was to open and let in another Daughter, and so on successively as they came in Being, and then all the Daughters became Tenants in common *in Tail general, with Remainder in Fee to* Richard. *Mary*, one of the Daughters, dies, and upon her Death *Richard* becomes intitled to one Third of the Estate; afterwards *Mary* the younger is born, and then the Estate opened again to let her in for a Third of the two surviving Sisters Estate, and she dying her Share likewise is to come to *Richard* the Remainder-Man; and this he collected from the Words of the Devise. My Brother *W.* insists, That the Estate once vested in *Susan* would not open to let in Daughters born afterwards, but that they must take by Way of cross Remainders; but this is a forced Construction, for the Words of the Devise are, "*That all the* "*Daughters should take as Tenants in common*," and no Construction shall prevail contrary to the express Words of the Will to vest the whole Estate in *Susan*, with cross Remainders to the Daughters born afterwards; that Estates once vested may open again, is a Point well
(175.) settled in Law. 11 *Rep.* 80. *Lewis Bowles*'s Case. 1 *Inst.* 28. *a.* And when this Case was heard before *Macclesfield*, Chancellor, 25 *January* 1722. upon a Bill for Account of the Profits of the Estate, his Lordship decreed that

that the Rents and Profits of the Estate should be divided equally amongst the Daughters, which shews clearly, that upon Birth of Sisters they should all take equally as Tenants in Common.

H. C. J. This is the common Case of every Marriage Settlement, where Remainders are to Daughters in Common, they are to take equally as they arise *in esse*, and become Tenants in Common, or Jointenants, with the Sisters before in Being.

E. Serjeant: They must take as Tenants in Common, for so was the Intention of the Testator; and not that they should take cross Remainders; the express Words of the Will are, "That they shall take as Tenants in "Common, and not as Jointenants;" and nothing can more fully express the Testator's Intentions, that they shall not inherit one after another. The Heir at Law can in this Case have no Pretensions, for he is intirely cut out and disinherited by the Will; and therefore no Construction can be made in his Favour, as Heir at Law.

The Case of *Gilbert* versus *Witty*, *Cro. Jac.* 655. is stronger than the Case in Question; and yet there it was adjudged that the Brothers should not take Remainders after one another, for tho' perhaps a cross Remainder may be by Implication, where there are two Devisees only, yet there cannot be without express Limitation, where the Devise is to three or more several Persons. There are several more Cases to this Purpose, and the Case of *Megnal* versus *Holmes* is like the present Question.

2 *Roll.*

2 *Roll. Rep.* 281. 1 *Vent.* 224. 2 *Keb.* 700, 756. And so concluded, that if the Devise to *Thomas* the Younger was void as an Executory Devise, then by the Death of *W.* the whole Estate vested in *Susan*, and the other Daughters, as they came *in esse*, as Tenants in Common, and as they or any of them die, *Richard* the Remainder Man becomes intitled to her Share.

Mr. *S.* Counsel for Sir *Thomas Stephens* the Residuary Legatee.

Since the Determination in *Pell* and *Brown*'s Case, there is no Question but there may be a Limitation over upon a Fee Conditional, and therefore the Limitation over to his Grandson *Thomas* was good; but in this Case both the Contingencies have happened by the Death of *W.* and *J.* before they attained the Age of twenty-one. The next Question therefore is, whether the Limitation over to such other Son as *Mary* should have, there being no other (176.) Son at that Time in Being, when he shall attain his Age of twenty-one Years, is a good Devise; and this some of the Gentlemen who spoke before have attempted to make good by way of Executory Devise.

The Rule which governs Executory Devises has been often debated in the Courts of Law; and it is agreed, that Limitations for a Life or Lives in Being, are good Executory Devises. But this Rule has never been carried further, but Executory Devises, as often as they came under the Consideration of the Law, have been discountenanced; and the Reason is, that every Executory Devise, so far

far as it goes, is a Perpetuity; and this was the Foundation which governs the Resolution in the Case of *Scatterwood* versus *Edge*. *Salk.* 229. 1 *Sid.* 37, 47. 2 *Saund.* 380. *Carter* 53. *Show. P. Cases* 137. The Case of *Massingbery* versus *Ash* does indeed go further, but that Case was determined in 1684. and was not in the least regarded in any of the subsequent Resolutions; and if the Reasons in that Case come to be considered, it is not so strong; for it appears that the Judges grounded their Opinion in that Case upon a Supposition, that all the Contingencies were limited and confined to fall within the Compass of Twenty-one Years; and that was in the Case of a Term in Trust only, and not any Limitations over. 2 *Chan. Rep.* 282. The Devise in the present Case is not a Contingency confined to Twenty-one Years, or for Lives in Being, but is both for a Life in Being, and Twenty-one Years. In the Case of *Gore* versus *Gore* (2 Barn. 209. 229. 355) this Point bore a a strong Contest, and yet the farthest that that Case could run, was only for one Life and nine Months. But should this Devise be held good as to Time, yet it is not so in Substance; for tho' a Fee in Contingency may be limited over in Case of an Executory Devise, yet a Contingency cannot be limited upon a Contingency. *Ventr.* 236. And this Point never was carried farther than *Pell* and *Brown*'s Case.

The next Persons who claim under the Devise are the Daughters *Susan* and *Sarah*, and as to them the Devise is no more than this: Sir *William Stephens* devised to his two Grandsons

Grandsons in Fee, upon the Contingency of their attaining the Age of Twenty-one; after that to the first and every other Son of *Mary* and the Heirs Male of their Bodies, and upon Failure of such Issue, then to the Daughters. It is not insisted upon that the Daughters in this Case are to take by way of Executory Devise, the Limitation to them being upon Failure of Issue Male, and therefore if they can take at all, it must be by way of Remainder; but that is not possible, because a Remainder, as a Remainder, cannot be limited upon a Fee. *Plowd.* 29. 1 *Inst.* 18. *a. Finch*
(177.) *L.* 112. *Plowd.* 235. *a.* 239. *Cro. Jac.* 590. *Pell's* and *Brown's* Case. *Palm.* 138. *Dyer* 33. Serjeant *Wright* was I suppose aware of this Objection, and therefore contends that the two Grandsons *W.* and *T.* took an Estate-tail only; but there is no Colour for such a Construction. The Devise is "To them and "their Heirs for ever;" but in Case they die before they attain the Age of Twenty-one Years, *&c.*

If these Words do not create a Fee-simple Conditional, it is impossible any Words can. Had the Limitation been to him and his Heirs for ever, that would have been a Fee-simple absolute, and the subsequent Words, *viz.* "*And* "*if he die before Twenty-one*," make it Conditional. When the Testator intends to create an Estate-tail, he does it by Words proper to create such an Estate, *viz.* "*And for Default* "*of such Issue Male*," which limited the preceding general Words, and shew what Heirs he meant, *viz.* Heirs of his Body. We are to

to take the Devise itself from the Words of the Will, which are upon his dying before Twenty-one, and not upon his dying without Heirs Male under twenty-one. This plainly shews the Testator's Intentions, that the Estate of his two Grandsons *W.* and *T.* was to cease at all Events upon their Decease before Twenty-one. This therefore reduces the Devise to the Daughters to the first Question, *viz.* That, if they have any Claim, it is by way of Remainder, and by Remainder they cannot take, because limited upon a Fee. There is the same Objection to the Claim of *Richard* the Remainder-Man in Fee, and the Devise to him is void for the same Reasons. The next Person who stands upon the Will is Sir *Thomas Stephens* the Residuary Devisee, and all the Testator's Estate must go to him, or to the Heir at Law; it is pretty clear the Heir at Law can have no Claim, for she is mentioned several Times in the Will, and the whole Estate is devised away from her. The only Question therefore that remains is, whether there are sufficient Words in the Devise to carry the Estate to the Residuary Devisee. *Vide Allen* 28. *Salk.* 239. 2 *Ventr.* 285. 3 *Mod.* 229. 1 *Lev.* 212. 1 *Saund.* 180. 1 *Leon.* 251. The Testator having devised all his Estate whatsoever and wheresoever, before undevised to the Residuary Devisee, by these Words, which are as general as Words can be, he becomes intitled to the Lands in Question; for all the preceding Limitations being void, the Estate in Question remained undevised.

F. Counſel for the Heir at Law. He agreed with *S.* that all the Limitations in this Will were void, for they muſt take Effect either as Remainders, or Executory Deviſes. As to the firſt, they could not veſt, becauſe limited after a Fee. 1 *Rep.* 81. *Popham* 34. And ſo it was held in *Pell's* and *Brown's* Caſe.

(178.) As to the ſecond, this Deviſe goes further than any Caſe, except that of *Maſſingbery* verſus *Aſh*, which cannot have its full Weight in this Caſe, becauſe there the Determination of the Judges went upon one ſingle Point only; and in all Caſes ever ſince the firſt Introduction of Executory Deviſes, the Judges have diſcouraged the Extent of them, becauſe tending to eſtabliſh Perpetuities. *Parl. Caſes*, the Duke of *Norfolk's* Caſe. The Queſtion therefore is reduced to this, Whether the Reſiduary Legatee, or the Heir at Law, is intitled? The Teſtator by the Deviſe to his two Grandſons *W.* and *T.* diſpoſed of his whole Eſtate, and had nothing left but a bare Poſſibility. It cannot be intended that the Teſtator imagined that the Limitations over to the Sons and Daughters of *Mary* were void, or that he intended that the Reſiduary Deviſee ſhould take any of the Lands mentioned in the Will, for the Deviſe to him is by expreſs Words, of all his Eſtate not before deviſed. The Caſe of *Wright* and *Wall*, *Michaelmas* 1725. *in Com. Banc.* comes up pretty near to the preſent Queſtion: That was a Deviſe to *Carter* and his Heirs, and the Teſtator afterwards by the ſame Will deviſes all his Eſtate before undeviſed over to another Person;

Person; *Carter* died in the Life-time of the Testator; adjudged that the Estates mentioned in the Devise should go to the Heir of the Testator, and not to the Residuary Devisee; and so concluded, that since *Thomas* the Infant could not take by way of Executory Devise, nor the Daughters, nor *Richard*, by way of Remainder, the Heir at Law has a good Title. *Adjournatur* for a second Argument.

The King *against* Kinaston, Hil. 7 Geo. II. *B. R.*

On a Rule to shew Cause against an Information, no supplemental Affidavits introductive of new Matter to be read but in Confirmation only.

INformation was moved for, and a Rule to shew Cause: At the Day fresh Affidavits were produced, Part in Confirmation, and Part introductory of new Matter; and the Question was, Whether the Affidavits could be read according to the Course of the Court, it being objected, that no supplemental Affidavits could be made but in Confirmation only.

Cur': Where Affidavits are produced, Part in Confirmation, and Part introductory of new Matter, it is not a general Rule that they shall be absolutely rejected; but the Court will be pretty nice in distinguishing what is new Matter, and what is in Confirmation of the old.

In Affidavits upon which the Rule was made, the Complaint was, that *A.* and *B.* and several other persons, *&c.* but no Person particularly charged; these Affidavits were not (179.)

produced, in order to fix the Charge upon particular Persons.

The Affidavits now offered are intirely introductive of new Matter; for the Charge in the first Affidavits being general, a general Answer would have been sufficient; but this is reducing it to a particular Charge, and therefore makes a particular Answer necessary.

The King *against* the Commissioners of Sewers for the County of Lincoln. Hil. 7 Geo. II. *B. R.*

Certiorari *to remove Proceedings of Commissioners of Sewers after Fine estreated.*

PResentment, that the House of *J. S.* standing upon the River *B.* in the County of *Lincoln*, was ruinous, and that the Water had sap'd the Foundation, by which the Lands adjoining were in Danger of being overflowed, and was become a Nusance to the Inhabitants thereabouts. The Defendant was convicted, and the Fine estreated into the Exchequer. Defendant mov'd for a *Certiorari* to remove all Proceedings.

Mr. *A.* objected, that the Fine being estreated, it was now too late.

Cur': There does not appear to be any general Inconveniency in this Case, neither in Prejudice of Navigation, or from the Danger of an Inundation over the County, which are the principal Reasons to induce this Court not to refuse a *Certiorari*; this is only the Case of a common Nusance, and therefore proper to remove it by *Certiorari*; it being estreated makes no Difference.

Fathers

Fathers *versus* Calcot, Hil. 7 Geo. II. *B. R.*

Where an Indebitatus assumpsit *lies for Rent.*

INdebitatus Assumpsit in Consideration the Plaintiff permitted the Defendant to kill Sheep in his Passage, he promised to pay 30 *s. per Ann.* Verdict for the Plaintiff, and Error brought. It was objected, that this being for Rent upon Lease, an *Indebitatus Assumpsit* would not lie, but a *Quantum meruit. Parker cont':* It has been held that an *Indebitatus Assumpsit* does not lie for Rent *secundum ratam.* (180.) 4 Mod. 78. But where it is upon an express Promise for an Easement, *&c. Indebitatus Assumpsit* is the proper Action. *Hard.* 366. 3 *Mod.* 240.

Cur': This is not a Lease which passes any Interest or Property in the Soil, but is grounded upon an express Promise for an Easement, and *Indebitatus Assumpsit* is a proper Action in such Cases. Judgment affirmed.

Spencer *ver.* Donally, Hil. 7 Geo. II. *B. R.*

Variance between the Recognizance and Bail piece.

ACTION against *John Donally*, Esq; and in the Bail-piece named *John Donally*, Gent. but Recognizance was taken by the Name of *John Donally*, Esq; and so a Variance from the Bail-piece. *Scire facias* against the Bail upon this Recognizance, and the Master entred a *Protulit Recordum. Kettleby* mov'd

mov'd to make the Record agreeable to the Bail-piece, and the Court gave him leave to do it, tho' it made a Variance between the Recognizance and the Original Action; for *per Cur'* the Plaintiff should have taken Advantage of it before, for there was no Bail to the Action, as this Bail-piece is taken; you cannot enter a Recognizance different from the Bail-piece, and there being no *final Judgment on the* Nul tiel Record, the Entry of the *Protulit Recordum* must be set aside.

Wells *ver.* Kitchinson, Hil. 7 Geo. II. *B. R.*

Mistake in the Teste *of a* Scire facias.

SECOND *Scire facias* upon a Judgment *teste Philip* Lord *Hardwicke*, 21 *November*, *&c.* returnable the first Day of this Term. The Plaintiff prayed to amend by striking out the Words *Philip* Lord *Hardwicke*, and inserting the Words Sir *Philip York*, Knt. [*Note*; the Lord Chief Justice's Patent of Peerage was dated 23 *Novemb.* 1733.] There was cited *Blackamore's* Case, 8 *Rep.* 156. *Cro. Eliz.* 183, 203. *Tho. Jones* 41. *Pasch.* 1 *Geo.* 2. *Gitely* versus *Costen. Ca. Sa.* taken out upon Affirmance of a Judgment tested 13 *February*, but upon Motion the *Teste* was amended and made 12. So *Mich.* 12 *Geo.* 1. *Hughes* versus *Alvarez*, Motion to amend a Writ of Enquiry after executed; this was an Action of *Assumpsit* upon two Promises, the Inquest gave Damages upon the first Promise only,

only, and the Entry was *occasione præmissor'*, which Words were struck out, and Entry was *occasione primæ promissionis*. Cro. Car. 147. 2 Bulf. 35. 1 Roll. Abr. 201. Mod. Cas. (i. e. 6 Mod. Rep.) 263, 310. 1 Salk. 52, 49. Cro. Jac. 372. This is a judicial Writ, and under the Controul of the Court; *sed adjournatur*, Mr. *S.* desiring Time to look into Cases. (181.)

Desbordes *ver.* Horsey, Hil. 6 Geo. II. *B. R.*

Writ of Error on a Judgment upon a Bond for Payment of Money only, is no Superfedeas, *unless Bail be put in.*

DEBT upon Bond conditioned to pay so much Money as was mentioned to be due in such a particular Deed; after Judgment the Defendant brought Error, but no Bail was entred according to the Statute 3 *Jac.* 1. *c.* 8.

Afterwards the Plaintiff sued out a *Ca. Sa.* by Virtue whereof he took the Defendant in Execution, who now mov'd to be discharged, having brought Error before the *Ca. Sa.* was sued out.

S. Counsel *econ.* A Writ of Error is no *Supersedeas* to a Judgment in Debt upon a Bond for Payment of Money only, as in the present Case, except Bail be put in; and of this Opinion was the Court, and so the Motion was denied.

Law

Law *versus* Law, Hil. 7 Geo. II.
B. R.

Motion to waive Plea of Solvit ad diem *to a Bond, and plead the Stat.* 5 & 6 Edw. 6.

IN Debt upon Bond the Defendant pleaded *Solvit ad diem.* Mr. *F.* Counsel mov'd to withdraw this Plea, and plead the 5 & 6 *Edw.* 6. *c.* 16. concerning the Sale of Offices.

The Court inclined strongly against the Motion, but at last he cited the Case of *Meard* versus *Philips*, *Trin.* 5 *Geo.* 2. (2 Stra. 906) where the Defendant pleaded *Nil debet* to a Bond, and after Special Demurrer, and Joinder in Demurrer, the Court gave leave to withdraw the Plea, and plead two Special Matters in Bar; and the Reason upon which the Motion was founded was, that the Judges were gone out of Town, it being in *Whitsun* Holydays; and therefore the Defendant was obliged to join in Demurrer.

This is a stronger Case than the Case at Bar, being after Joinder in Demurrer, and here all is in the Paper, and the Plaintiff has not replied. *Rule to shew Cause.*

(182.) Crompton *versus* Deen, Hil. 7 Geo. II.
B. R.

A Debtor taking Benefit of Stat. 2 Geo. 2, *for Relief of Insolvent Debtors,*

ACTION by Indorsee of a Bill of Exchange; the Defendant pleads the Statute 2 *Geo.* 2. "*Intituled an Act for Relief of* "*Insolvent Debtors*," and that he was legally discharged at the Sessions.

The Plaintiff replies he is a Creditor, and had

had no Notice *secundum formam Stat'*; the Defendant rejoins that he had no Notice of the Indorsement; and upon Demurrer the Question was, whether the Defendant was obliged to give Notice.

obliged to give Notice to Creditors residing within ten Miles, &c.

Mr. *B.* for the Plaintiff cited 4 *Rep.* 82. *b.* 8 *Rep.* 92. 1 *Roll. Abr.* 469. *D. p.* 1.

A. econ.' cited *Hob.* 51. *Holmes* versus *Twist. Hob.* 68. *Richards* versus *Carvamel. Cro. Car.* 571. *Cro. Jac.* 493. 1 *Leon.* 105. *Salk.* 457.

H. C. J. This Question arises upon a Construction of the Act of Parliament, and does not fall within the Rules of Law; and there is no Question but at Law he who is to take Benefit of a Condition, and is privy, must give Notice.

It appears evidently, that the Plaintiff is a Creditor, and he has replied Specially according to the Act, that he is residing within ten Miles, and had no Notice.

As to the Defendant's Notice of the Indorsement, it is not material, for he has taken upon himself to be responsible to the Indorsee at all Events; and the Words of the Act of Parliament are express, *that he shall give Notice to all his Creditors.*

What is said by the Defendant in this Case might be said in all other Cases; suppose a Creditor dies, is it sufficient for the Defendant to say he did not know, or had no Notice, who was his Executor or Administrator?

Not necessary to give any Opinion as to the Form of Pleading, for Rejoinder is perfectly immaterial.

P.

P. J. The Defendant has made himself responsible to the Drawee or Order, and therefore 'tis at his own Peril to take Notice of the Indorsement; he is to have the Benefit of the Act of Parliament, and ought to comply with the Terms; this is stronger than the Case of a Bond, and yet in that Case the Obligor is at his Peril to give Notice.

P. and *L.* Justices, to the same Effect. *Judgment for the Plaintiff.*

(183.) Hoare *versus* Gates, Hil. 7 Geo. II.

B. R.

Rejoinder, Averring the Bill of Middlesex *issued in the Vacation.*

IN *Assumpsit* the Defendant pleads *Non Assumpsit infra sex Annos.* The Plaintiff replies, that he took out a Bill of *Middlesex* in such a Term, and avers *quod causa Actionis accrevit infra sex Annos ante prosecutionem Billæ prædict'.* To this the Defendant rejoins, that the Bill of *Middlesex* issued *post clausum Terminum*, and altho' Bills issuing out in Vacation are entred as of the last Day of the Term preceding, yet *de facto*, and *in rei veritate*, the Bill of *Middlesex* issued *post clausum Termini*, *viz.* on such a Day; and concludes, *Quod causa Actionis non accrevit, &c.*

To this the Plaintiff demurred, for that an Averment in those Cases was not to be allowed, and cited *Latch* 233. *T. Jones* 149. 1 *Lev.* 214. 1 *Sid.* 53, 60. 1 *Roll. Abr.* 893. *p.* 4. 1 *Mod.* 188. *Cro. E.* 181. *Stiles* 156. *Carth.* 232. *Show.* 253. 4 *Mod.* 129. 3 *Lev.* 28.

Carth.

Carth. 227. *Hob.* 156, 297. *Pasch.* 5 *Geo.* 2. *Jones* versus *Bennet*. *Assumpsit* upon a promissory Note by Indorsee; the Defendant pleaded he was attached the 12th of *February*, and that the Note was not indorsed till after that Day. The Plaintiff replies, that *de facto*, and *in rei veritate*, the Attachment issued the 25th of *March* following, and that before that Time the Note was indorsed; and upon Demurrer the Averment was over-ruled.

So *Pasch.* 2 *Geo.* 2. *Estwick* versus *Cooke* (Ld. Raym. 1557), upon Demurrer Averment was held naught. *Michaelmas* 4 *Geo.* 2. *Fuller* versus *Joslyn* (1 Barn. 404), Lady *Twisden* gave a Warrant of Attorney to confess Judgment, but died in *Easter* Term, before Judgment was entred on the Roll. Judgment was afterwards entred up in the same Term, and was held good, because the whole Term is but one Day in Law, and so the Entry was previous to her Death.

On the other Side it was argued, that this Relation was a meer Fiction in Law, and would admit of an Averment. 2 *Keb.* 173, 198. 3 *Keb.* 213, 214. *Cro. Jac.* 561. *Cro. Car.* 264. 1 *Roll. Abr.* 258. *p.* 4. That this Fiction was contrary to the express Words of an Act of Parliament, and therefore an Averment might be made.

W. Serjeant, argued for the Demurrer. It is admitted that by the Course of the Court, and in Point of Law, a Bill of *Middlesex* sued out in Vacation, is a Writ of the preceding Term; but the Objection is, that this is a meer Fiction, and must give way to the Aver- (184.)
ment

ment. How does it appear to be a Fiction? It does not appear upon the Record to be a Fiction, and a Record is of so high a Nature, and imports in itself such an absolute Truth, as to admit of no Averment to the contrary. 1 *Inst.* 117. *b.* 268.

This Averment is destructive of the Record, for if it should be made to issue out of Term, the Writ is void. *Salk.* 700. *Carth.* 70. The Averment therefore is contrary to the Bill itself, and shall not be admitted as in 2 *Rep.* 4. *Goddard*'s Case, he is stopt to make Averment against what is exprest in the Record. *Skin.* 32. And the Reason is, because it tends to falsify the Record; *a fortiori*, where it tends to destroy the Record, as in the present Case. The Reason why a Bill of *Middlesex* has no *Teste* is, because it is the Act of the Court *sedente Curia*, and the whole Term in Judgment of Law is but one Day, and was once thought so considerable that it could not be divided. *Yelv.* 35. It is now indeed otherwise, for the Plaintiff may by a special Memorandum shew the particular Day when the Bill issued; but this is not repugnant to the Record, for it is still a Bill of that Term. And in *Fuller* and *Joslyn*'s Case it was held, that a Judgment entered at any Time in Term is a Judgment of the first Day of that Term; and this Fiction is so well established, it will admit of no Averment to the contrary. 1 *Salk.* 401. *T. Jones* 150. The Statute of Limitations can make no Difference, that Act has been made ever since 21 *Jac.* 1. and no one Precedent that an Averment of this kind was ever

ever admitted, *& quod in facto est inusitatum, in jure reprobatur.* There was a Case argued in the Exchequer, the Case of *King* versus *Man*, which comes up pretty near to the Point in Question. The 5th of *October*, 7 *Geo.* 1. Baron *Price* granted his *Fiat* during the Vacation for an Extent, which was had accordingly, tested the last Day of the preceding Term. Upon this Extent the Defendant's Goods were taken in Execution; the Defendant craved *Oyer* of the Extent, and pleaded that the *Fiat* was obtained the 5th of *October*, and that the Extent, *de facto & in rei veritate*, issued on that Day; but the Court was of Opinion that the *Teste* was binding. There another Question arose indeed as to the Regularity of issuing *Fiats* in Vacation; and upon Motion as to that Point, the Court held it irregular. But as to the *Teste*, this is a Case in Point, and shews that an Averment contrary to the Record cannot be made.

D. con. This Averment makes no Inconsistency, the Statute of Limitations has always been considered as a beneficial Law, and the Words are, "That Process shall be commenced "and sued;" which last Words mean not only *Emanatio brevis*, but an Act to be done by the (185.) Party upon that Writ. It is clear, that at the Time of issuing the Bill of *Middlesex* the Statute was a Bar, it was his own Fault he did not commence his Action sooner; and he shall not come afterwards, and by a meer Fiction take Advantage of his own Laches, contrary to the express Words of an Act of Parliament. The Cause of Action which the Plaintiff had

was

was barred by the Statute, and the Issuing out of the Bill of *Middlesex* afterwards could not give him new Cause of Action by Relation.

If an Averment cannot be made, because in Fiction of Law a Bill sued out in Vacation is a Bill of the preceding Term, it is impossible to plead a Tender. 1 *Ventr.* 28. *Cro. Jac.* 561. 1 *Ventr.* 362. A *Latitat* may bear *Teste* before the Cause of Action commenced, and the Plaintiff may aver, that in Fact the *Latitat* issued in Vacation; by the same Reason the Defendant may aver the precise Time that in Fact the Bill of *Middlesex* issued. 2 *Keb.* 173, 175. 3 *Keb.* 212, 213. The Time when a *Latitat* issued out is traversable, and may be averred. *Cro. Car.* 264. *Roll. Abr.* 538. The Averment does not destroy the Record, it only goes to the Time in which it issued, but does not deny that there was such Process. The Case in *Lutw.* 329. is not like the present Case, that was concerning a Judicial Writ, which has a *Teste*, but a Bill of *Middlesex* has no *Teste*, and the Averment is to meer Matter of Fact only, and Issue may be taken upon it.

H. C. J. If in point of law such an Averment can be made, it is pretty extraordinary this Case has not come in Question before. In the Case of Original Writs out of Chancery, the *Teste* is often preceding the Time that in Fact they are sued out upon, and so are allow'd by Course of the Court. There is no great Difference between an Original and a Bill of *Middlesex*, in Point of Law; the Original has a *Teste*, and the particular Day on which

which it iſſues appears; and ſo it is in Fact in the Caſe of a Bill of *Middleſex*, for the Term in which it iſſues appears, and in Judgment of Law the whole Term is but one Day; this Fiction does not ſupport a Wrong, but rather goes in aid of the Party to recover his juſt Debt. Conſider the Caſe of a Judgment, the Fiction in Law was in that Caſe ſo ſtrong even in Caſe of Purchaſers *bona fide*, that there was forced to be an Act of Parliament to reſtrain it. There can be no great Inconveniency if the Averment in the present Caſe be diſallowed, the moſt it can extend to is the Statute of Limitations, which in this Caſe is only for a Vacation, and that ſeems a leſs Inconvenience than to overturn a ſettled Rule of Law.

P. J. He cited *Maynard* 134. 3 *Keb.* 213. *Chancy* and *Rutter*. If Averments cannot be made, it will introduce many Inconveniences; as in Caſe of a Tender, where a Man is juſtly indebted, and tenders the Money at the Day, and the Party refuſes; can he afterwards have his Action, and by a Fiction in Law avoid the Tender? Where indeed an Action is brought againſt an Officer, he shall take Benefit of the Fiction, but that is to avoid a Wrong. (186.)

P. J. A Bill of *Middleſex* cannot iſſue but in Term, and therefore when it is taken out in Vacation, it muſt of Neceſſity have Relation to the preceding Term, or it is void; and this in Effect is the Substance of the Averment, for if the Averment ſtands, it deſtroys the Writ.

L. J. In *Raym.* T. 161. *Bilton* verſus *Johnſon*,

son, which was an Action of false Imprisonment, the same Objections were made as in this Case; but it was held, that altho' the *Teste* of the Writ was upon record, and the Plaintiff cannot aver against it, yet there would be great Inconveniences if the Plaintiff cannot set forth the very Time of the Purchase of the Writ, and the Relation of the *Teste* is only to prevent Fraud, and not justify a Tort. This comes up to the present Question, where the Defendant's Defence arises from the Statute of Limitations, whether we are to suffer the Statute to be eluded by supporting this Fiction; and if the Act of Parliament is considered, the Sense of it seems to be not where a Man sues out Process only, which is the Precept of the Court, but where he sues it with Effect. *Adjournatur* to be spoke to again. *Vide* 4 *Rep.* 71. *a. b. Hynde's Case.* 2 *Salk.* 650. *Lazier* versus *Dyer.*

Storey *ver.* Gardner, Hil. 7 Geo. II. *B. R.*

Verdict finding only Part of the Issue.

TRespass for entring and carrying away his Cattle; the Defendant, as to Part of the Cattle, pleads Not guilty; and as to breaking and entring his Close, and carrying away the Rest of the Cattle, he justifies for Distress of Rent in Arrear. The Plaintiff replies, *de injuria sua propria*, and Verdict for the Plaintiff.

Taylor mov'd in Arrest of Judgment, that the Verdict was imperfect, for here are two Issues, and the Jury have only found, that the Defendant

Defendant did of his own Wrong enter and carry away the Cattle mentioned in the Justification *inter alia Averia*, but as to Part of the Cattle mentioned in the Plea of Not guilty, there is no Finding at all as to that.

Parker econ. If the Jury have given less Damages than they ought, it is to the Detriment of the Plaintiff, and the Defendant cannot take Advantage in Arrest of Judgment of a Verdict that is apparently for his Benefit; the Jury have found that he entred *de injuria sua propria*, and drove away the Cattle *inter alia averia*, which is sufficient after Verdict. (187.)

Cur': A Verdict may cure an insufficient Declaration, but it cannot help itself; the Objection is very material, for the Verdict does not determine the Matter put in Issue between the Parties: Suppose a new Action to be brought for the Cattle mentioned in the Plea of Not guilty, what can the Defendant plead? He cannot plead this Judgment in Bar, for there is no Finding upon the Not guilty; neither is there any Action depending. And *H.* C. J. said, it was such a Verdict that the Court ought not to give Judgment upon it. The Plaintiff desired further Time to search into it, for the Record may be amended here, and the Verdict below; and *sic adjournatur.*

The King *versus* Theedham, Hil. 7 Geo. II. *B. R.*

Costs against the Prosecutor of an Information for not going to Trial in three Years.

INformation for an Assault, and the Parties at Issue; but the Prosecutor did not proceed to Trial within three Years, being the Time prescribed by Act of Parliament. *K.* now moved for Costs against the Prosecutor, but not having an Affidavit to verify the Fact, the Motion was denied.

Devenish *ver.* Barton, Hil. 7 Geo. II. *B. R.*

To intitle a Justice of Peace to double Costs on an Action brought against him, it ought to be suggested on Record, that he was a Justice of Peace.

B. Serjeant, mov'd for double Costs upon Statute 7 *Jac.* 1. This was an Action against a Justice of Peace for taking away the Plaintiff's Gun.

The Plaintiff discontinued, and there was an Affidavit produced, that the Defendant was a Justice of Peace.

Cur': There ought to be a Suggestion of this Matter on the Roll; and *per Lee*, it was so determined in the Case of *Cooper* versus *Cathurall*, which was upon a Nonsuit. It was then pray'd that the Roll might be brought into Court, and the Suggestion entered.

(188.) *H.* opposed the Motion, because it did not appear by the Affidavit, that he acted in the Affair in Capacity of Justice of Peace.

Cur'

Cur': Shew Cause why the Defendant should not have Leave to enter the Suggestion upon the Roll, and have double Costs; and there was cited the Case of the *King* ver. *Colan*. Indictment for exercising the Trade, *&c.* and not having served seven Years Apprenticeship. The Defendant pleaded Not guilty, and gave in Evidence that he was a Soldier, and having served so many Years as the Act of Parliament required in those Cases, he was intitled, by Virtue thereof, to exercise any Trade without Service; and was also intitled by the same Act to double Costs, but neglected at the Trial to get the Judge's Certificate: He afterwards came and applied to this Court, and had a Rule to suggest this Matter upon the Roll, and then had double Costs allowed him. *Trin.* 3 *Geo.* 1. *King* versus *Colan*.

Cumber *versus* Hill, Hil. 7 Geo. II. *B. R.*

As to cross Remainders.

IN Ejectment the Jury found a Special Verdict to this Effect: "*Richard Holden* "the Grandfather died seised of several Lands, "Tenements, *&c.* in Fee, having by Will de-"vised the same to his Grandson *Richard* "*Holden*, and *Elizabeth* his Grandaughter, to "be equally divided amongst them, and to the "Heirs of their respective Bodies; and for "Default of such Issue, the Remainder to his "Grandaughter *Anne Holden* in Fee." *Anne* marries *John Jersey*, and afterwards *Elizabeth* dies without Issue of her Body. The Question

tion was, whether *Richard Holden* and *Elizabeth* took an Estate in common, with cross Remainders to the Heirs of their Bodies; for then the Estate could not vest in *Anne*, but upon Failure of Issue of both their Bodies. Or whether this was an Estate in common, with Remainder to the Heirs of their Bodies generally; for in that Case one Moiety of the Estate would vest in *Anne*, who had the Remainder in Fee immediately upon the Death of either of them without Issue.

B. Serjeant argued, that this was not an Estate in common, but in Special Tail, by reason of the Possibility that *R.* and *E.* might have Issue between them: For if Lands are given to a Man that has a Wife, and to a Woman that has a Husband, and the Heirs of
(189.) their two Bodies, they have presently an Estate-Tail, for the Possibility that they may marry. 1 *Inst.* 20. *b.* 25. *b.* But admitting in this Case that they are Tenants in Common only, yet they are Tenants in Common, with cross Remainders to the Issue of their Bodies; for the Words are, "That in Default of such "Issue the Estate shall remain over;" and there can be no Failure of Issue so long as either of them has Issue of his Body. And it was expresly adjudged in the Case of *Holmes* versus *Meynel.* *Raym.* T. 452. S. C. *T. Jones* 172. S. C. *Skinner* 17. S. C. And there is no Difference between this and the present Case, except in this Case the Words (*equally to be divided*) precede the Word (*Heirs*) and in that Case they are subsequent. There is also a Case in 4 *Leon.* 14. *c.* 51. directly in Point.

Point. *Vide* this Case cited *Raym.* T. 454. in the Case of *Holmes* versus *Meynel.* There are two Cases in the Books which seem to impugn this Resolution, one in *Cro. Jac.* 655. *Gilbert* versus *Witty*, the other in 2 *Roll. Abr.* 416. *T. p.* 3. But the first of these Cases is answered in the Case of *Holmes* versus *Meynel*, and the other in *Roll. Abr.* is expresly denied to be Law. *Vide Raym.* T. 455.

D. Serjeant, *econ.* There is no Case cited in Point to prove this a cross Remainder: The Case of *Holmes* versus *Meynel* widely differs; for the Devise there is of "All the "Testator's Lands to his two Daughters, "*&c.*" and if they happen to die without Issue, then he devises all his said Lands, *&c.* And the Reason of the Judgment in that Case is, because the Devise over was of (*all*) his Lands; and in Case (*they*) die without Issue, *i. e.* both of his Daughters, so likewise the Devise over in that Case was to a Stranger, but here it is to one *in equali jure* with the first Devisees. As to the Case in *Leon.* the Devise was to his Sons in Tail, and in Case they died without Issue, that then the (*whole*) Land should remain to a Stranger in Fee; here the Remainder was to a Stranger also, and the Word (*whole*) shew, that all his Estate should pass together, and not by Parts and in Moieties; and the whole Land could not pass till all the Sons were dead without Issue. As to the other Objection, that this is an Estate in Special Tail, because there is a Possibility of their having Issue between them, the supposition is not only absurd in itself, but likewise is

is too diſtant and remote a poſſibility for the Law to expect.

H. C. J. The Conſtruction of croſs Remainders has been extended of late Years, and the Diſtinctions upon which they have been determined are pretty nice. There is no Doubt but if this Caſe cannot be diſtinguiſhed from the Caſe of *Holmes* verſus *Meynel*, but that Caſe will govern the preſent Queſtion; for it was determined upon great
(190.) Authority and mature Conſideration. The preſent Caſe is a Deviſe to *Richard* and *Elizabeth*, and the Heirs of their reſpective Bodies, which gives them an Eſtate in common in Tail general; and the rather by Reaſon of the Word (*reſpective*) for it is now the ſame as if the Deviſe had been of one Moiety to his Grandſon *Richard* and the Heirs of his Body, and of the other Moiety to his Grandaughter *Elizabeth* and the Heirs of her Body: And then follows, "And for Default of ſuch Iſſue, *i. e.* upon "Failure of Iſſue of either of them, the Re-"mainder over." In the Caſe of *Holmes* verſus *Weynel*, the Teſtator's Intentions appear to be clearly, that the Remainder-Man ſhould not take, but upon Failure of Iſſue by both his Daughters, for the Words, "And in "Caſe they," *i. e.* both his Daughters, ſhould die without Iſſue, that then (*all*) his Lands ſhould remain over, ſo that by expreſs Words the Remainder was not to veſt but upon Failure of Iſſue by both the Daughters, and in that Caſe all his Lands were to remain over. In all Caſes where the Deviſe is to

two

two and the Heirs of their respective Bodies, these Words create immediate Remainders; and the Words following, *viz.* "And in Default of such Issue;" these Words can make no Alteration, nor is there any Case where they have been construed to create cross Remainders. *Sed adjournatur* to be spoke to again.

The King *against* Hooper, Hil. 7 Geo. II. *B. R.*

Information for Assault and Imprisonment in Newfoundland *denied, being Local.*

THE Defendant, being a Captain of a Ship, carried *Wills* a Sailor into *Newfoundland*, which Country is Part of his Majesty's Dominions; and there, by the Assistance of some *Spaniards*, imprisoned and laid him in Irons, and likewise treated him in a most barbarous Manner.

Mr. *H.* upon these Circumstances mov'd for an Information against the Defendant.

H. C. J. Where would you try this Information? all Criminal Prosecutions are Local; you may bring your Action, but cannot try this by way of Information. There is an Act of Parliament made in King *William*'s Reign, which gives an Information against Governors for Misdemeanors in foreign Plantations; but this Case is not within that Statute. *Motion denied* per Cur'.

Hooker

(191.) **Hooker *ver.* Hooker, Hil. 7 Geo. II.**
B. R.

Dower.

THIS Case was sent out of the Chancery for the Opinion of the Judges of this Court, and was in Effect to this Purpose.

J. B. by Lease and Release conveyed certain Lands to Trustees in Fee, to the Use of the Trustees and their Heirs during the Life of *William Hooker, Sen.* Remainder to *William Hooker* the Younger for Life, Remainder to his first and every other Son in Tail Male, Remainder to his Daughters in Tail, Remainder to the right Heirs of *William Hooker, Sen.* Upon the Death of *William Hooker* the Elder, *William Hooker* the Younger enters, and marries the Plaintiff, but died without Issue; the Question was, whether his Widow the Plaintiff was intitled to Dower? The Contingent Remainders were arising, and both the Estate for Life and Remainder in Fee vested in him at the Time of his Death.

B. Serjeant for the Plaintiff: Upon the Death of *W. H. Sen.* the Fee-simple descended to *W.* the Younger his Son and Heir, but whether the Fee comes to him by Descent, or by way of Remainder, is not material; for both Estates being vested and united in him at the same Time, was a Merger of the Estate for Life, and he died seised of the Fee-simple. Admitted that where an Estate for Life, with Remainder in Fee, are limited by one and the same Conveyance, and both consolidated, yet they

they may open again to let in Contingent Remainders, as in *Lewis Bowles*'s Case, 11 *Rep.* 80. But this Matter is out of the Deed, for the Fee did not come to *William Hooker* the Younger intirely by the Deed, but by the Death of *William* the Elder, he happening to be his Heir. The Limitation to the first and every other Son of *William* the Younger was a Remainder in Contingency, and he having no Issue at the Death of *William* the Elder, that Contingency was destroyed, and could never vest afterwards, but he became seised of an absolute Estate in Fee; but admitting the Contingency to subsist, yet as it never came *in esse* during the Life of *William* the Younger, he died seised in Fee, and so his Feme became intitled to Dower. Estates in Dower are much favoured in Law, and a Feme shall be indowed of a base Fee, as in *Seymor*'s Case, 10 *Rep.* 95. So if a Disseisor die seised, his Widow shall have Dower so long as the Disseisin continues. But he insisted upon the first Point, that the Fee coming to *William* the Younger by the Death of *William Hooker* (192.) the Elder, the Contingent Remainders were destroyed, and relied upon the Case of *Kent* versus *Harpool.* 1 *Vent.* 306. *T. Jones* 76. S. C. 3 *Keb.* 380. The Father Tenant for Life, Remainder to the Son for Life, Remainder to the first Son of that Son, (who was not born) Remainder to the Heirs of the Body of the Father; the Father died before the first Son was born; and held the Descent of the Intail to the Son had destroyed the Contingent Remainders.

F.

F. econ. The Question is, whether *William Hooker* the Younger was seised of such an absolute Estate at all Events as will intitle the Feme to Dower? Here is no Estate limited to *William Hooker, Sen.* but the Remainder is to his Heirs, so that when his Heir takes, he must take by way of Purchase. *William* the Younger does not claim the Fee by Descent, but by Virtue of the Conveyance; and if it should be look'd upon as a Merger, it is defeating the Intent of the Donor; and this Distinction is made in *Wiscot*'s Case, 2 *Rep.* 61. When an Estate for Life, and the Fee-simple is limited by the same Conveyance, both Estates may stand together; but when the Fee descends, or comes by Purchase, in either of these Cases the Estate for Life is merged. This may be compared to the Case of *Plunket* and *Holmes*, *Raym.* T. 28. which was a Devise to *Thomas* for Life, with a Remainder to him in Fee upon a Contingency, which likewise descended to him by the Death of the Devisor; and yet it was said, that this should not confound the Estate for Life; which shews clearly, that altho' the Estates are in some sort consolidated until the Contingency happen, yet they are not consolidated to all Manner of Purposes, and therefore the Feme not intitled to Dower. This is to be considered as two distinct Estates vested in *William Hooker* at the same Time; for if a Son be born during his Life, or after his Death, the Feme could not have Dower. If such a Construction, as is contended for, should prevail, it would introduce great Confusion; for suppose the Husband

Husband dies, and his Wife brings a Writ of Dower and recovers, afterwards a Son is born, her Estate in Dower must be defeated. The Case of *Boothby* versus *Vernon*, *Pasch.* 11 *Geo.* 1. (9 Mod. 147) is in Point, and notwithstanding the Feme was seised in Fee all the Time of her Marriage, yet because there was an intermediate Estate which took Effect during her Life, it was held, the Husband was not intitled as Tenant by the Curtesy. 1 *Roll. Abr.* 676. *F.* 1. *B.* seised in Fee of a defeazable Estate, takes Feme and dies, afterwards the Estate is defeated, his Wife shall not be endowed. So 1 *Roll. Abr.* 677. *b.* Lessee for Life, Reversion to the Husband in Fee, Lessee lets the Land to the Husband for Life of the Husband, (193.) afterwards the Husband dies, then the Lessee dies; the Feme shall not be endowed, because there was a Possibility of Reversion during the Coverture as to the Freehold; so in the present Case there is a Possibility that the Contingency may happen during the particular Estate, and therefore the Feme shall not be endowed. 1 *Inst.* 40. The Wife shall not be endowed but where the Issue by Possibility might inherit; but here the Issue could not inherit, but must take by Purchase; *Ergo* the Feme shall not be endowed.

H. C. J. The Question depends upon two Points, whether by the Death of *W. H.* the Elder, *W.* the Younger having then no Son, the Contingent Remainder was not destroyed; so that *William* the Younger was seised in Fee at all Events. And in the next Place suppose the Contingencies to subsist, whether the

the Possibility that they might happen, (but in Effect never did so,) will defeat the Wife of her Dower. As to the first, it seems to me that the Contingencies are destroy'd; where indeed an Estate is limited to *A.* for Life, Remainder to his first and every other Son, *&c.* Remainder to *A.* in Fee; in that Case the Estate is to some Purposes consolidated, but not so as to destroy the Contingent Remainders, for *A.* claims both Estates by the same Conveyance. But there is no Case where the Fee comes *prior* to the Conveyance, that the Contingencies are not destroyed, as in the Case of *Kent* versus *Harpool.* So in 2 *Saunders* 380. *Purefoy* versus *Rogers.* 2 *Lev.* 39. S. C. Feme Tenant for Life, Remainder to her first Son, she takes a Husband, and before the Birth of the Son, he in Remainder in Fee conveys the Inheritance to Baron and Feme, then she has a Son and dies; the Son cannot take; for not being *in esse* when the particular Estate was destroyed, the Contingency can never arise afterwards. This is a middle Case, for the Fee neither came by Discent, nor yet intirely by Purchase; for tho' *W. H.* the Younger claims the Fee by Virtue of the Deed, yet it is by Matter meerly intrinsical, he happening to be Heir to *W. H.* the Elder, and so falls with the Reason of *Wiscot*'s Case, and the other Cases which have been cited in Support of this Matter. But suppose the Estate for Life not to be absolutely merged, but that there still remained an *Hiatus* to let in the Contingencies, as in *Lewis Bowles*'s Case, it is to be considered whether this possi-

bility

bility will hinder the Wife's Title of Dower when the Contingency never happens. What do the Books say? that the Estates are consolidated, and that the Husband and Wife in such Case are Tenants in Special Tail. *Cordal's* Case in *Cro. Eliz.* 316. is the only Case which contradicts these Resolutions: And in the Case of *Purefoy* versus *Rogers*, this Case was denied by *Holt* to be Law; and *H.* C. J. said he had seen a Manuscript Note of that Case and there it was said, that *Bridgman*, C. J. denied *Cordal's* Case likewise. 3 *Lev.* 437. *Duncomb* versus *Duncomb*, in that Case a *Quære* is added by the Reporter, but it seems to be good Law, because there was an intermediate Estate limited to *J. S.* which hinders the Estates from joining? There is another Case to this Purpose, 15 *Ed.* 3. 4 & 5. And so concluded upon the whole, that *W. H.* the Elder dying before the Birth of a Son, the Contingency was destroyed; and in the next Place, if the Contingency was not destroyed, yet it never happening, the Feme was intitled to Dower. The Case of *Boothby* versus *Vernon* does not in the least impeach this Resolution; for in that Case *Anne* was only Tenant for Life, no Estate of Inheritance in her either absolute or liable to be devested. (194.)

P. P. and *L.* Justices, of the same Opinion.

Kent

Kent *ver.* Kent & al. Hil. 7 Geo. II. *B. R.*

Dower. Error brought by the Surviving Tenant, and the Heir of the other Tenant, whether Costs on Affirmance ought to be given against the Surviving Tenant only.

IN Dower, *unde nihil habet*, in Ireland, the Plaintiff had Judgment to recover a third Part of the Land, *&c.* and Damages, to the Time of Judgment. *May*, one of the Defendants, dies, and his heir and the Surviving Tenant brought Error in *B. R.* there, where Judgment was affirmed, and Costs and Damages for the mean Seisin given against *Kent* only, whereupon *Kent* and *May*'s Heir brought Error in this Court; and the Question was, whether the Judgment for Costs against *Kent* only was not erroneous.

C. Serjeant, for the Plaintiff in Error argued, that Damages to be recovered in Dower, by the Statute of *Merton*, are not a *Tempore Mortis* until Livery of Seisin, but from the Time of Purchasing the Writ *usque diem Judicii*, 1 Roll. Abr. 760. B. Carth. 133. But the Statute does not extend to *Ireland*. 1 Sid. 357. The Judgment therefore in the present Case must be founded upon 16 *&* 17 *Car.* 2. *c.* 8. 1, 3. And the express Words of this Act of Parliament are, " That the Plaintiff or " Plaintiffs in Error shall pay such Costs and " Damages as shall be awarded upon Affirm- " ance of Judgment;" and in this Case there being two Plaintiffs in Error, it is not in the Power of the Court to give Judgment against one only; for they are to be considered in Nature of Wrong-doers, as in Trespass against two

two the Court cannot separate and give Costs and Damages against one only.

Cur': The Question is, whether the Person, for whose Favour and Benefit the Judgment is, can bring Error? 5 *Rep.* 39. *b.* (195.)

C. Serj. Where the Error is by Default of the Court, altho' it be for the Advantage of the Party, yet the Party who has Benefit by it may assign it for Error; and to this Purpose cited *Yelv.* 107. *Heines* versus *Guy.* 1 *Roll. Abr.* 759. 8 *Rep.* 59. *Beecher*'s Case. 4 *Leon.* 61.

E. Serjeant *econ.* The Case cited out of *Siderfin* cannot be Law, for this Act of Parliament was previous to the famous Law called *Poining*'s Law, which was 10 *H.* 7. But whether Damages are given by this Act of Parliament, or by 16 & 17 *Car.* 2. is not material, for the single Question is, whether Damages and Costs against *Kent* only, the surviving Tenant, makes this Judgment erroneous? And as to this Point he said, the Damages did survive, and are to be taken against *Kent* only, not by reason of Survivorship, but because the Heir is not chargeable with Damages recovered against his Ancestor. *Cro. Eliz.* 558. If there be a Recovery in a real Action of the Land and Damages, the Tenant against whom the Recovery is had dies, and the Heir who ought to have the Writ of Error in respect of the Lands will Release all Writs of Error, yet the Executor may sue a Writ of Error to avoid the Judgment for Damages, for the Heir was not chargeable in Damages, but the Executor.

In

In Actions where no Damages and Costs are recoverable, no Damages to be paid *pro dilatione* as in a Writ of *Formedon*. So Executors pay no Costs or Damages, *pro dilatione*. 1 *Vent.* 166. 1 *Mod.* 77. 1 *Ventr.* 88. 3 *Lev.* 375. *Gale* versus *Till. Carth.* 135. The Statute 16 & 17 *Car.* 2. was made only to secure Costs for Delay of Execution in such Manner as they were before secured by 3 *Jac.* 1. *c.* 8. in Personal Actions; but Damages are given in Satisfaction of an Injury which are in Nature of a Trespass, and die with the Person, where the Person dies before Judgment was perfected. 3 *Lev.* 275. In this Case Damages for the mean Seisin are given to the Time of the Original Judgment, which was in the Life of the Ancestor, and the Heir is not answerable for Damages had against the Ancestor. The Judgment therefore against *Kent* for Damages for the mean Seisin and Costs for Delay in the Writ of Error, is a good Judgment; but if the Court is of Opinion that the Judgment is erroneous, he prayed the Court would give such Judgment as the Court in *Ireland* ought to have given. *Cro. Car.* 411, 442. This will alter our Security, and whereas now we have Remedy against one only, we shall in that Case have it against two. 1 *Salk.* 401.

(196.) *C.* Serj. in Reply: Damages are given for a new Wrong occasioned by the bringing of the Writ of Error, and delaying the Plaintiff of his Execution, and therefore all Parties concerned in the Wrong ought to be equally included in the Judgment. As to this Court's giving

giving such Judgment as the Court in *Ireland* ought to have given, the Statute is, "That "Judgment must be given by the Court "which awards Execution;" and this Court cannot award Execution for Lands in *Ireland*; but upon Affirmance of Judgment this Court writes to the Court in *Ireland*, and thereupon Execution is awarded.

H. C. J. We will consider of it whether the Judgment is to be reversed, and if a new Judgment is to be given, in what Manner it must be done. *Vide* 3 *Rep.* 13. *b.* In *Harbert's* Case. If Judgment be against two Disseisors in Assise for Land and Damages, and one Disseisor dies, Execution shall not be awarded against the Surviving Disseisor only, but as well the Heir as the Surviving Disseisor shall be equally charged, but in Actions Personal it is otherwise. *Vide* 3 *Lev.* 55. *Graves* versus *Morley*. The Jury finding Part only is naught, and not cured by Verdict; and *vide* the Difference where the whole is put in Issue, and where Part only; for in the last Case it is a Discontinuance, which is aided by Verdict. 3 *Lev.* 39, 40.

The King *against* Reeves, Hil. 7 Geo. II. *B. R.*

Prohibition on a Libel for Tithes.

LIBEL in the Spiritual Court for Tithes. The Plaintiff intitles himself, as Vicar, to all Tithes arising within the Vill, except Tithes of Corn growing upon particular

Lands, said to be *due* to him *either by Endowment, Custom, or Prescription:* As to Part the Defendant pleads Payment of an Annual *Easter* Offering of a Hen of the Value of 6 *d.* and 1 *d.* for Agistment of all unprofitable Cattle. After Sentence in the Spiritual Court, the Defendant comes and moves for a Prohibition, *suggesting, that Tithes of unprofitable Cattle were due to the Rector or Impropriator, and not to the Vicar, Curate, or Sequestrator.*

L. Doctor of Laws: There is a material Difference between the Suggestion and the Pleadings below, 1 *Vent.* 335. Prohibition was prayed to a Suit for Tithes, upon a Suggestion that the Lands out of which they were demanded lay out of the Parish, and the Bounds of the Parish are triable at Common Law; but the Court denied the Prohibition, because it did not appear that a Plea thereof had been offered in the Ecclesiastical Court.

(197.)

The Defendant likewise *suggests* that the Plaintiff *intitles himself by Custom*, and that *all Customs are triable at Common Law only*; but Custom is only mentioned incidently, and the Plaintiff rests himself intirely upon the Endowment; *and when the Foundation of the Suit is Spiritual, and Temporal Matter comes incidently in Question, the Ecclesiastical Court shall try the Temporal Matter, but shall try it as Courts of Common Law would.* 2 Salk. 547. Shotter *versus* Friend. 3 Lev. 72. Bonsey *versus* Lee.

If the bare Mention of a Custom be Reason sufficient to grant a Prohibition, the Jurisdiction of the Spiritual Court will be absolutely overturned;

turned; for wherever the Libel is for Tithes, there is no Case but the Word *Custom* is mentioned.

Offerings are due by Custom only, and yet there is no Question but the Spiritual Court has a Jurisdiction in that Case, and so is the Statute 27 *H.* 8. *c.* 20. *s.* 1. *de circumspecte agatis.* 32. *H.* 8. *c.* 7. 2 *Edw.* 6. 13. Personal Tithes to be paid in such Manner and Form, as have been of Right yielded and paid within forty Years next before the making this Act, or of Right or by Custom ought to have been paid; here is a Custom to be tried, and yet there is no Question but a Suit in the Spiritual Court will lie upon this Statute.

This is after Sentence, and in that Case the Court always Judges favourably of the Proceedings in the Spiritual Court; if the Defendant has Reason to object to the Jurisdiction, he ought to have applied to this Court before Sentence. *Cro. Eliz.* 595. 2 *Keb.* 612. *Noy* 70.

In all Cases where this Court prohibits upon Sentence, it is where the Defect of Jurisdiction appears upon the Face of the Libel, and not by Reason of Matter suggested *dehors* the Libel; and so it was ruled in 1723. *Wright* versus *Allen*, upon Motion for Prohibition to the Admiralty.

B. Sen. on the same Side: To induce the Court to grant a Prohibition, it is suggested, that Agistment of all unprofitable Cattle have Time immemorial been paid to the Rector of Bishop *Wilson*, and not to the Vicar, Curate, or Sequestrator.

Taking therefore this Matter upon their own Suggestion, there is no Reason to grant a Prohibition, for notwithstanding the Right in this Case is in Question, yet where it is a Right between Spiritual Persons only, a Prohibition shall not be granted. 13 *Rep.* 37 *de modo decimandi.* 2 *Roll. Abr.* 310. Z. 1. 311. *pl.* 6.

(198.) *Cur':* The Reason of those Cases is where the Suit depending is between Ecclesiastical Persons, but in this Case the Rector is no Party, but the Parishioners.

B. Where Right is between Spiritual Persons only, whether the Person is a Party or not is not material. 2 *Roll. Abr.* 310. *pl.* 6. *God.* 149. 2 *Bulf.* 157. *Drayton* versus *Cotterill.*

In the Prohibition, it is suggested, that the Tithes belong to the Rector, and not to the Vicar; as to the Jurisdiction therefore there is no Defect, but the Suggestion is *pro defectu Triationis.* 1 Leon. 59

The Reason of granting Prohibitions where a Custom is pleaded, or the Suit is for a Duty arising by Custom, is, because in the Spiritual Court thirty or forty Years Usage is sufficient Evidence of a Custom or Prescription; which being contrary to the Rule of Common Law, that no Custom or Prescription can arise within Time of Memory, therefore the Common Law prohibits the Ecclesiastical Courts, where the Question arises upon a Custom. 2 *Bulf.* 157. But here the Suit is grounded upon the Endowment, whether by Endowment the Vicar is intitled; and the Custom only falls in

in as incident to the *Quantum*, how much is in Reality due for Tithes, and not whether Tithes generally is due by Custom.

Here is therefore in Nature of a common Libel for Tithes, in which Case no Prohibition goes, tho' the Plaintiff's Right to Tithes is denied. 2 *Keb.* 439. 1 *Vent.* 3. *Bishop of Lincoln* versus *Smith.* Libel for a Pension, to which the Plaintiff intitled himself by Prescription; and on Motion for a Prohibition, it was held by *Kelynge* and *Twisden*, that Pensions, tho' they are by Prescription, may be sued for in the Spiritual Court, for having Conuzance of the Principal, that shall draw in the Accessary, contrary to my Lord *Coke*'s Opinion in 2 *Inst.* 491.

This being after Sentence, the Defendant comes too late; here is no want of Jurisdiction appearing upon the Face of the Libel, and the Distinction that runs in these Cases, is where the Objection to the Proceedings of the Ecclesiastical Judges is not *pro defectu Jurisdictionis*, but *Triationis*, and so is 1 *Show.* 158. *Shatter* versus *Friend.* Where there is want of Jurisdiction, Prohibition goes after Sentence, otherwise where the Suggestion goes to the Trial only.

F. econ. Where the Determination of the Spiritual Court extends to the Property of a Layman upon Matter not cognizable in that Court, it is not too late to come for a Prohibition altho' after Sentence.

Offerings are not due of common Right, but by Custom Time immemorial, and therefore not cognizable in the Spiritual Court, because

(199.) because it is admitted, that Evidence of a Custom for thirty or forty Years is a good Foundation to establish a Custom in that Court; and this is the Reason of granting Prohibitions when a Custom comes in Question, that it may be tried whether this is such a Custom as is warranted by the Common Law.

In all Cases where there is want of Jurisdiction either in Right or Point of Trial, a Prohibition goes; but this does not conclude the Jurisdiction of the Spiritual Court, for if the Jury find in Favour of the Crown, a Consultation will be granted.

The Plaintiff intitles himself to Tithes either by Endowment, Custom or Prescription, which is too general, for it is not so much as suggested when this Endowment commenced, nor does it appear to be by Grant from the Rector, or with the Concurrence of the Ordinary, which is necessary to the Establishment of all Endowments, and if they go upon the Endowment in Fact, without relying upon the Custom or Prescription, they must shew it such an Endowment, as has all the Qualifications of an Endowment; all that is suggested in this Case is, that *Nich. de Rosi*, Prebendary of Bishop *Wilson*, granted, *&c.* If the Plaintiff cannot intitle himself by Endowment, it must be by Prescription, which is triable at Common Law, and there only. 2 *Salk.* 548. If therefore it appears, that the Facts suggested in the Libel are cognizable only at Law, Prohibition in all Cases goes after Sentence, except where the Fact tried in the Spiritual Court did not arise within the Diocese. It is said that this

is

is a Question of Right between Ecclesiastical Persons only, but the Fact is otherwise. It is a Suit for Tithes between the Vicar and the Parishioners, and it may prove inconvenient to carry this Rule too far, for there is no Reason why Ecclesiastical Persons should be excluded from trying their Right at Common Law; and he said the Case of *Smith* in 1 *Vent.* had been denied over and over again. There were several other Cases cited to shew that a Prohibition would lie. *Carth.* 97. *Broad* versus *Piper.* Prohibition after Sentence for a Mortuary. *Carth.* 33. *Vanacre* versus *Spleen.* Libel against the Defendant for not repairing Part of the Church Wall, which by Custom he was bound to do. A Prohibition was granted after Sentence, because a Custom is not triable in that Court. 1 *Salk.* 334. If the Custom is not denied, the Spiritual Court shall proceed, for there is no other Remedy; but if the Custom be denied, a Prohibition shall go. *Non propter defectum Jurisdictionis sed Triationis.* 3 Keb. 523, 527. 2 Lutw. 1059. Thompson *versus* Davenport. Customs triable at Common Law only. *Moore* 457. *Blinco* versus *Marson.* A Vicar libelled against the Parson for Tithes of Glebe, the Parson brought a Prohibition, and held maintainable; and if a Special Custom be after Endowment of Vicarage, it is issuable. 2 *Roll. Abr.* 335. *pl.* 3. S. C. *Litt. Rep.* 263. (200.)

H. C. J. Where there is want of Jurisdiction, Prohibition goes after Sentence; where indeed a Person is cited out of his Diocese, and pleads to the Libel, no Prohibition goes, because

because there is no want of Jurisdiction; but a particular Privilege by the Statute, and the Defendant waives that, and answers to the Citation, he is by that Means concluded from taking Advantage of the Statute afterwards.

Offerings are due by Custom only, and when that comes in Question, a Prohibition must go: Suppose the Case of a *Modus* pleaded in the Spiritual Court, and denied, Prohibitions are always granted.

This is a Libel for Tithes of unprofitable Cattle, and the Plaintiff intitles himself either by Endowment, Custom or Prescription. The Court below has given Sentence for the Plaintiff; *sed non constat*, whether that Judgment was founded upon the Endowment, Custom, or Prescription.

If there had been a particular Endowment alledged, and Judgment upon that, if it afterwards appears to this Court, that the Plaintiff had no Right to recover, Prohibition goes, tho' after Sentence.

This Case indeed is not so strong; for here is no particular Endowment alledged, and therefore must be intended to be given in Evidence; but the Objection that I have is, that it does not appear upon what Part of the Libel the Judgment is founded; whether upon the Endowment, Custom or Prescription separately, or upon all of them put together; and if such a general Way of Proceeding should be allowed, it would in a Manner defeat the Jurisdiction of the Common Law, as to Oblations, by suggesting generally an Endowment coupled with a Custom or Prescription;

tion; for if we ſhould intend the Judgment to go ſingly upon the Endowment, (becauſe that Word happens to be mentioned in the Libel) it muſt eſtabliſh at all Events the Juriſdiction of the Spiritual Courts, with reſpect to Oblations; and perhaps at the ſame Time there was not one Syllable given in Evidence to ſupport the Endowment, but the Sentence was intirely founded upon the Cuſtom or Preſcription, which are triable at the Common Law only.

L. J. It does not appear certainly, that there is want of Juriſdiction; for whether the Sentence is founded upon the Endowment or Cuſtom does not appear upon the Face of the Proceedings; ſo doubted whether a Prohibition ſhould go as to that Part.

But as to the Oblations, it is clear the Spiritual Court can have no Juriſdiction, for that is due only by Cuſtom; indeed after the Cuſtom is once eſtabliſhed at Common Law, the Spiritual Court may proceed, which is all that is provided by the Statute *de circumſpecte agatis.* (201.)

P. and *P.* Juſtices, to the ſame Effect: Prohibition was granted to declare upon by Conſent of the whole Court.

Aſhley *ver.* Branwood, Hil. 7 Geo. II. *B. R.*

Error in Formedon.

THomas Entweizle ſeiſed in Fee deviſes to his eldeſt Son in Tail, Remainder to his ſecond Son *T.* in Tail, Remainder to his third Son

Son *E.* in Tail, Remainder to his own right Heirs. The Defendant pleads that *Thomas*, the Brother and Heir of *A.* made a Feoffment with Warranty, and that thereupon the Defendant entred.

The Plaintiff replies, that at the Time of the Feoffment there was a Lessee for Years in Possession? and to this the Defendant demurred. Judgment in the Common Pleas, *quod bona & sufficiens Replicatio existit.*

W. Serjeant argued for the Plaintiffs in Error, That the Plea was ill, for that it does not appear that *A.* was dead at the Time of the Feoffment by *Thomas*, nor is Seisin alledged in *Thomas* at the Time of the Feoffment. *Bro. Abr.* Tit. *Formedon*, 4. *Bar*, 4. *Pleading*, 5. *Inst.* 303. *a. Rast. Entr.* 361. But if *Thomas* was seised, yet if Seisin was not by Virtue of the Will, it will not avail. 1 *Roll. Abr.* 634. 10 *Rep.* 97. *Brooks's Abr.* Tit. *Formedon*, 16.

Collateral Warranty, which commences by Disseisin, no Bar. 2 *Salk.* 686. 8 *Rep.* 53. 1 *Inst.* 352. *b. Cro. Car.* 391. It is said tho' Seisin in *Thomas* be not expresly averred, yet it sufficiently appears from the Pleading, that *Thomas* was seised. *Thomas* is called Brother and Heir, and this is said to be sufficient, for *nemo est hæres viventis*; but this is only a Consequence, and does not appear upon the Plea; the Estate-Tail might have been discontinued at the Time of the Feoffment, and therefore tho' *Thomas* was Heir at that Time, yet he might not have Seisin; but the Alledging *Thomas* to be Brother and Heir is quite immaterial, for he does not claim as Heir to *A.* but

but *per formam Doni*; therefore Heir, or not Heir, is totally immaterial. *Coke, Sect.* 73. 2 *Inst.* 241.

B. Sen. con. Not necessary in *Formedon* to alledge Seisin, tho' it may be in Assise. *Brooke's Abr.* Tit. *Titles*, 59. Admitted that it was usual in Pleading *Formedons* to alledge Seisin, and that most of the Precedents are so; but the Question is, whether this is absolutely necessary, so that the Want of it makes Error? said what was alledged in Pleading was Tantamount to an Averment of Seisin; for it is said, that *Thomas* infeoffed *B.* by Virtue whereof *B.* was seised in Fee, and an Averment of a Feoffment, and that thereupon the Feoffee became seised, implies Seisin in the Feoffor. 1 *Inst.* 303. 18 *Ed.* 4. 29. *pl.* 27. Upon *Non Feoffavit* Coverture may be given in Evidence, to shew that it was not a corrupt Feoffment; by the same Reason Seisin may be given in Evidence. In all Cases where Feoffment is pleaded, Seisin must be proved in Evidence, or otherwise the Feoffment not effectual, and therefore the same Force as if put in Issue. It is objected, that, for any Thing that appears, Feoffment might be made in the Life-time of *A.* but it is said, *Thomas* Brother and Heir, which necessarily implies the Death of *A.* at the Time of the Feoffment. 3 *Lev.* 219. *Hob.* 51. *Dyer* 340. *Yelv.* 27. *Existens* the same as *adtunc existens.* 2 Mod. 129. (202.)

Objected, that if the Seisin by *Thomas* was not a rightful Seisin at the Time of the Feoffment, the Warranty works no Discontinuance; but there are many Instances where Warranty

Warranty shall bind, tho' no Seisin, as Collateral Warranty. 1 *Inst.* 375.

Collateral Warranty will bind without Assets, and Seisin not necessary. 1 *Inst.* 370. *a.* He that was Owner, and might have inherited his Warranty, shall bind. 1 *Inst.* 370. *a.*

H. C. J. There are two Questions, whether in Pleading a *Formedon*, it is necessary to alledge Seisin; and Secondly, whether this is not sufficiently shewn upon the Pleadings: The Feoffment, as pleaded, is a Feoffment with Collateral Warranty, and to make that effectual there must be an Alienation. Suppose in this Case there had been an Alienation by *A.* and after a Warranty by *Thomas*, the Estate at that Time being turned to a Right, and Warranty descending upon *E.* and his Heirs, is a good Bar; but this is not the present Case, for there is no Seisin alledged in *Thomas* at the Time of the Feoffment, nor no Appearance of an Alienation. It is therefore a Collateral Warranty without Alienation or Disseisin, and the Reason given in 1 *Inst.* why Collateral Warranty bars, is, because the Estate was turned to a Right at the Time of the Warranty; Feoffment will imply only Livery and Attornment, but never intends Seisin or Title in the Feoffor; for it must be
(208.) alledged upon the Pleadings. 2 *Vent.* 208. Brother and Heir is immaterial, and cannot import such a Seisin in *Thomas* as is necessary. In Pleading nothing is to be intended, especially in this Case, which goes in Disinheritance of the Issue in Tail. The single Question is, whether Collateral Warranty can be pleaded

pleaded in Bar, where the Estate was never turned to a Right. *Note*; the Replication was given up without Argument; *sed Quære*, if not good. A Man makes a Lease for Years, and afterwards a Deed of Feoffment, and delivers Seisin, the Lessee being in Possession, and not assenting to the Feoffment, the Livery is void; for albeit the Feoffor has the Freehold and Inheritance in him, yet it is not sufficient; for Livery must be given of the Possession also. 1 *Inst.* 48. *b.* 2 *Rep.* 31, 32. *Bettisworth*'s Case. *Note*; in *Hilary* Term following Judgment was affirmed, with further Argument upon the Reasons, *ut supra*.

Cock *versus* Vivian, Hil. 7 Geo. II.

B. R.

Motion in Arrest of Judgment.

IN *Assumpsit* the Plaintiff laid several Counts in his Declaration, amongst which were an *Indebitatus Assumpsit* and a *Quantum Meruit* for Pickage and Stallage, and an *Indebitatus Assumpsit* and a *Quantum Meruit* for Toll; in Consideration that the Plaintiff had permitted the Defendant to expose his Corn to Sale in the Market, the Defendant promised to pay, *&c.* The Jury found for the Plaintiff, and gave Damages upon the *whole Declaration generally*; it was now mov'd in Arrest of Judgment by Mr. *Hussey* and *Robinson*, *that the Verdict being general, if any one of the Counts were naught, the Plaintiff cannot have Judgment.*

Indebitatus Assumpsit lies only for a

There are two material Objections to the Declaration; *First*, *an* Indebitatus Assumpsit *will*

Sum certain, Quantum Meruit *for a Sum uncertain.*

will not lie but for a Sum certain; and Secondly, a Quantum Meruit *lies not for a Sum certain;* these Objections go to the Declaration in general, but in particular to the four last Counts; in the fifth and seventh the Plaintiff declares, that in Consideration the Plaintiff permitted the Defendant *to expose* his Corn to Sale, the Defendant promised to pay as much as should be due *secundum consuetudinem.* 2 Inst. 220. No Toll is due of common Right for Goods *brought to* a Fair or Market, unless they *be sold*, and then Toll to be taken of the Buyer; but in antient Fairs and Markets Toll may be paid for the *Standing*, &c. tho' nothing be *sold*; but this is not good unless by Special Custom. A Man cannot prescribe for Toll (204.) for going along the Highway, for it is against Common Law and common Right. 2 *Roll. Abr.* 522. 2 *Lutw.* 1336.

What was due is uncertain, and therefore an *Indebitatus Assumpsit* lies not; the common Method in those Cases is to distrain. *Indebitatus Assumpsit* never brought for a Heriot; the common Way is to seise or distrain. So in the Case of a Miller; the Plaintiff declares for so much Toll as was due *secundum consuetudinem*, and no Toll can be due by Custom. Custom is Local, and must always be applied to a certain Place; whereas the Plaintiff can have no Title but by Prescription, which is Personal, *i. e.* that he, and all those whose Estate he has, Time out of Mind had certain Toll, *&c. Vide* 4 *Rep.* 31. *b.* 32. *a.* As to the second Objection, a *Quantum Meruit* lies not for Toll; for Toll in its own Nature implies

plies a Certainty. The Declaration is, *Quantum proinde rationabiliter habere meruerit*, without alledging any Custom; this implies a Duty indeed, but what that Duty is, must be ascertained by the Jury.

C. Serjeant *econ.* The Case cited in 2 *Inst.* 220. and *Lutw.* 1336. are not in Point for them. It is there held, that Toll for exposing Goods to Sale is not to be taken unless by Special Custom; we have here laid it specially, *secundum consuetudinem*, and so those Cases make for us.

The Case in *Roll. Abr.* for Toll for passing thro' the Highway, is not like the present Case; for that is against common Right, and no Custom can establish it.

Assumpsit lies not for a Heriot, or for Toll of a Mill; but even in those Cases, if the Plaintiff declares that in Consideration he permitted the Defendant to enjoy, *&c.* an *Assumpsit* lies; so in the Case of Toll, in Consideration the Plaintiff suffered the Defendant to carry away his Toll, he promised to pay what should be due *proinde secundum consuetudinem.* In 2 *Inst.* 220. Toll is said to be a reasonable Sum of Money due to the Owner of the Fair or Market upon Sale of Things tollable within the Fair or Market, or for Stallage, Pickage, or the like; so that the four last Counts are not to be confined to the Sale of Corn only, but for Stallage and Pickage also, which runs thro' the whole Declaration.

As to what is objected, that the Plaintiff cannot intitle himself to Toll by Custom, because Custom is Local. It is true in Pleading there

there is a Difference between Custom and Prescription. 2 *Lut.* 1522. 1 *Vent.* 389 3 *Keb.* 677. But in this Case the Plaintiff does not intitle himself by Custom, but that the Defendant promised to pay what should be due *secundum consuetudinem.*

(205.) It is objected, that a *Quantum Meruit* does not lie for Toll; we have not brought it for the Toll itself, but in Consideration the Plaintiff had permitted him to expose, *&c.* the Defendant promised to pay *Quantum proinde habere meruit*; and this being laid to be at the Request of the Defendant, is *Quasi ex contractu*, and in Consideration of this Enjoyment.

Where Money or any other Thing is due from one to another, it implies a Contract, *Indebitatus Assumpsit* for a Customary Fine *pro tenementis secundum consuetudinem manerii.* 1 Show. 35. 3 Mod. 240. 3 Lev. 262. 2 Leon. 179.

F. Counsel: *Indebitatus Assumpsit* will lie for Toll; *for where any Thing is due, the Law implies a Promise.* 2 Lev. 174. 3 Lev. 37.

Objected, that the Consideration is not good, for that no Toll is due for exposing Goods to Sale in a Fair or Market; if so, then the last Words are to be rejected, and it is a bare *Indebitatus Assumpsit* in Consideration the Plaintiff permitted the Defendant to enjoy the Toll, the Defendant *proinde* promised, *&c.* there is no Pretence to say, the *Quantum Meruit* lies not for Pickage and Stallage; and this is carried thro' all the Count, according to Lord *Coke*'s Description of the Word *Toll.* Here is a sufficient Consideration to raise a

Quantum

Quantum Meruit; for it is not for permitting him to expose to Sale in the Market generally, which the Defendant was intitled to of common Right, but for permitting him to expose his Goods in the Market-house to which he had no common Right.

D. Counsel: *Tolnetum* is a general Word for Toll. 2 *Lutw.* 1518. *Brook*, Tit. *Toll*, 2. Toll may be paid in Specie as well as in Money; and *Quantum Meruit* lies for Pickage and Stallage, being a reasonable Satisfaction to the Lord for the Use of his Soil. 2 *Lev.* 252.

Action lies for Corn in Specie, as where a Man promises to deliver so many Bushels of Corn, *Assumpsit* lies for not delivering so many Bushels. Toll must be certain, but Pickage, *&c.* need not. It is nothing but a reasonable Satisfaction, and what is reasonable may well be put in issue. *Plow.* 63. *b.* Trespass upon the Case by the Lord of a Vill, *eo quod Tolloneum asportavit & illud solvere recusavit.* Objection was taken to the Writ, that he could not carry away the Toll, unless it was paid before; but yet the Writ was adjudged good; for altho' the first Words were void, yet the last, *viz. Et illud solvere recusavit*, are sufficient, which answers another objection, that Toll may be paid as well by the Seller as Buyer. *Indebitatus Assumpsit* will lie in this Case, it is in Consideration of an Enjoyment, which is sufficient, especially after Verdict; for then (206.) the Law intends it to be grounded upon an express Promise made between the Parties, as in *Hardres* 366. Sir *John Trevor* versus

Roberts. Indebitatus Assumpsit to pay so much Money in Consideration the Plaintiff had licenced and permitted the Defendant to enjoy such Lands; after Verdict it was objected, that the Licence and Permission amounted to a Demise, and *ergo Debt ought to have been brought, and not an Action upon the Case*; but it was held, that upon an express Promise to pay Rent, *Assumpsit* would lie; and this being after Verdict, the Court would presume an express Promise; *Assumpsit* lies for a Copyhold Fine. 3 *Lev.* 261. *Shuttleworth* versus *Garnet*; and so was held by *Raymond* C. J. in *Capper*'s Case. *Assumpsit* by the Mayor of *London* to have the 20th Part of the Salt of every Stranger who brought it to the Port of *London*; and tho' there is no Reason alledged why he should have that Part, yet the Mayor had Judgment. *Dyer* 352. *b.* 4 *Mod.* 322. and so ruled by Baron *Comyns*, that *Indebitatus Assumpsit* would lie for so many Bushels of Salt from every Ship.

H. C. J. Here are several Counts in this Declaration, *and if any one Count is bad, the Plaintiff cannot have Judgment.* The first Objection is, that the Demand is general for Toll of Goods exposed to Sale; and that the Defendant promised to pay as much as should be due, *secundum consuetudinem*; whereas Toll is to be taken for Goods *sold* only, and then not due by Custom, but Prescription. It is admitted, that by Special Custom Toll may be taken, tho' nothing be sold; and so the Plaintiff has laid it in his Declaration *secundum consuetudinem.* The other part of the Objection

tion seems indeed more material, that the Plaintiff cannot intitle himself by Custom, but by Prescription, the one being Local, the other Personal; and this requires farther Consideration. The next Objection is, that the Consideration is insufficient, and *Indebitatus Assumpsit* lies not for a Demand of this Nature, for that there is nothing in certain laid to be due, and *Indebitatus Assumpsit* lies not but for a Thing certain. This might have been a good Objection at another Time; but it is now after Verdict, and we must intend an express Promise proved at the Trial, for the Jury have found the Promise. The next Objection is to the *Quantum Meruit*, that it will not lie for a Thing certain, and that the Consideration to induce the Promise is not sufficient. Here are two *Quantum Meruits*, the first is in Consideration the Plaintiff had permitted the Defendant to bring his Corn into the Market-house, he promised to pay, *Quantum proinde meruit*; *It is certain this Action lies not for a Certainty*, and Toll for Goods sold in the Market generally must be (207.) certain; but in this Case here is something superadded to the Custom, it is not for Toll of Corn exposed to Sale in the Market generally, but for Leave to expose his Corn, *&c.* in the Market-house, which is *extra* the Custom, and may be good Consideration to raise the Promise. The most material Objection is to the last Count, which is a *Quantum Meruit* generally, *pro Tolneto pro granis illis, &c. locat' in Marketo prædict' Quantum proinde rationabiliter habere meruerit.* To answer this

Objection, it is said the *Tolnetum* includes Pickage and Stallage, and that this Word runs thro' the whole Declaration; but the Question is, whether it can be taken so upon the Face of the Declaration; for here the Plaintiff has himself distinguished in the Declaration between the Duty arising from Pickage and Stallage, and what was due for Toll of Corn; and the last Count is general for Toll of Corn *locat' in Marketo prædict'*.

P. P. and *L.* Justices, to the same Effect. *Adjournatur* to be spoke to again.

A

A

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FINIS.

A

REPORT

OF

CASES

IN

Chancery, the *King's Bench*, &c.

In the Fourth, Fifth, Sixth, Seventh, and Eighth Years of his late Majesty King GEORGE the Second; during which Time Lord *King* was Lord High Chancellor of *Great Britain*, and the Lord *Raymond* and Lord *Hardwicke* were Lord Chief Justices of *England*.

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The King *and* The Mayor of Lymington. Hil. 5 Geo. 2.

Information.

INFORMATION being granted in the Nature of a *Quo Warranto*, and a Return made, the Plaintiff in order to defeat a Traverſe, before the Defendant had either pleaded, demurred, or traverſed, moved for a Trial at Bar, notwithſtanding the Defendant had then a Fortnight's Time to plead in: The Court denied the Motion, and ſaid they could not deprive the Defendant of the Benefit which the Law gives him by obliging him to join Iſſue by granting a Trial at Bar. We don't know upon what Iſſue may be joined.—Suppoſe this had been upon Ejectment, did you ever know ſuch a Motion granted? A Trial at Bar was never moved for before Iſſue joined.

The

The King *and* The Justices of the Borough of Wallingford.

Mandamus.

MANDAMUS to reimburse a Surveyor of the Highway according to 3 & 4 *W.* & *M.* c. 12. It was moved to supersede the Writ before any Return was made to it. The Court denied the Motion, and said, they could not quash the *Mandamus* before a Return was made.

The King *and* The Justices of the Peace for the County of Surry.

Roads.
* *Priv. Stat.* 4 *Geo.* c. 4.

BY the Act of* 4 *G.* 1. for amending the Roads from City of *London* to the Town of *East Grinstead* in *Sussex*, and to the Town of *Sutton* and *Kingston*, *Surry*, Commissioners and Trustees were appointed to mend the Roads and erect Gates and Turnpikes within such a particular Precinct; and further enacted, that the Justices of Peace for said Counties may at their Quarter-Sessions inquire into, hear and determine the Abuses committed by the Commissioners and Trustees in Execution of the Powers given them by Virtue of this Act. The Trustees erected a Turnpike in *Kingston*, which the Justices ordered to be pulled down and removed, and directed the Sheriff to put in Execution said Order.

(210.)

Mr. *Fazakerly* moved to quash this Order, insisting (and agreed to by the Court) that the

the Justices had no Authority to remove this Turnpike. The Act of Parliament gives the Commissioners a Power to erect any Turnpike or Turnpikes, Gates, *&c.* within such a particular District; if therefore this Turnpike be erected within the Place limited and prescribed by the Act, they have done no more than they are authorized to do, and consequently no Abuse of their Power. The Words of the Statute are general, and leave a discretionary Power in the Trustees to erect as many Turnpikes as they shall think convenient. But supposing this Turnpike was not erected within the Place prescribed by the Act, it is then clear that the Justices can have no Authority to take Conuzance of this Matter by Virtue of the Statute. For the Act circumscribes the Authority of the Justices to the Power given to the Trustees; and if they have taken upon them to erect Turnpikes in Places which are not within the Provision of the Act, then the Act is quite out of the Question, and the Trustees are guilty of a Nusance, and indictable for it at Common Law; and for that very Reason the Justices can have no Conuzance of the Matter, because the *locus in quo* is not within the Direction of the Act. There was another Objection taken to the Order, *viz.* That the Justices could not give Directions to the Sheriff to execute this Order, there being no Provision in the Act to this Purpose. But to this it was answered, that wherever an Act of Parliament gives a Power to the Sessions, *&c.* to hear and determine, it necessarily imports a Power

Power of Execution, and likewise extends to all Things which are incidents to the Power. The Sheriff is the proper Officer of the Sessions, and is obliged *ex officio* to execute their Orders; and for this Purpose was cited *The Queen* and *Wyat*, *Salk.* 380. *Lamb. Just. lib.* 1. *fo.* 50, 372, 381. *Dalt. Just.* 132, 397, 398. The Court quashed the Order upon the first Objection, and gave no Opinion upon the second.

The King *v.* Price.

Information.

INFORMATION in the Nature of *Quo Warranto.* In the Pleadings it was set forth, that the Borough of *New Radnor* was a Corporation Time immemorial, and that it was known and called by several Names. That Queen *Elizabeth* incorporated it afterwards by Letters Patents by the Name of *New Radnor*, and that it was provided by said Letters Patents, that no one *esset aut remaneret* a Capital Burgess who was not Resident and Commorant *infra Villam.*—There was a Replication and Rejoinder; and upon Demurrer, it was objected by Mr. *Bootle, jun.* that the Inducement to the Traverse upon the Replication was immaterial. It is set forth by way of Inducement, that the Defendant at the Time he was elected Capital Burgess, or at the Time he was sworn into his Office, was not Resident and Commorant *infra Villam prædict'*, *absque*, *&c.* and so traverses his being Resident, *&c.* Now the Charter in the disqualifying

qualifying Clause does not require that he shall be Resident at the Time of Election, but that he shall continue Burgess no longer than he is Resident and Commorant within the Borough, which disqualification does not extend to the Time of his Election, but to the not continuing Resident after his Election. So that what is alledged in the Inducement that he was not Resident, *&c.* at the Time of Election is immaterial, and therefore Judgment ought to go for the Defendant; for all Inducements to the Traverse ought to be material as well in the Case of the Crown as of the Subject; and so is 2 *Leon.* 52.

Mr. *Fazakerly cont':* Tho' the Form of Pleading is not so regular as might have been, yet upon the Face of the whole Pleading there appears a sufficient Averment to disqualify the Defendant. It is expresly alledged, that he was Commorant *per totum Tempus extra Villam*; and it is no where shewn in the Defendant's Plea, that he was qualified; he only says he was elected; but it is no where alledged that he was Commorant *infra Villam*, or intitled to exercise this Office; so that notwithstanding the Inducement to the Traverse, and the Traverse itself are naught, yet there still remains a sufficient Averment upon the Face of the Pleadings to disqualify the Defendant. By the 9th of *Anne*, twenty Informations of this Nature are put upon the same Footing as Civil Actions are, and therefore the Defect of the Inducement is now aided by the Statute of Jeofails.

The Court said, altho' the Inducement be immaterial,

immaterial, yet if there appears sufficient Matter in the Plea to disqualify the Defendant, that would support the Information. Statute of Jeofails will extend to this Case: The Defendant has not shewn this Defect in the Inducement for Cause upon the Demurrer, so that it is Matter of Form only which is aided by the Statute; and therefore the Objections in Support of the Demurrer were overruled, and Judgment against Defendant. *Trin. Term* 5 & 6 *G.* 2. 1732.

(212.) The King *v.* Brittain.

Indictment. Trade.

INDICTMENT for exercising the Trade of a Butcher within the City of not having served an Apprenticeship *secund' formam Stat'*, and then avers, that this was a Trade at the Time of making the Statute, *Usitat' infra Regnum Angliæ*; and upon Demurrer to this Indictment, it was objected that the *infra Regnum Angliæ* was wrong, because since the Union there is no such Place, but it ought now to be *infra Regnum Magnæ Britanniæ*; and cited the Case of the *King* and *Wingrow*, *Hil.* 2 *G.* 2. Indictment for exercising the Trade of a Butcher *in hoc Regno Angliæ*, and quashed. *The King* and *Parish*, *Hil.* and *Easter*, 3 *G.* 1. *King* and *Hog*, *Trin.* 9 *G.* 1. *King* and *Tomson*, *Hil.* 4 *G.* 2. on Demurrer. Serjeant *Chappell* allowed the Averment to be wrong, but said it was unnecessary—in the Case of *White* and *England*, 3 *Salk.* 42. 4 *Mod.* 145. Debt upon the

the Statute for using the Trade of a Tyler; and upon Demurrer it was objected, that the Declaration was ill, because the Plaintiff did not aver that the Trade of a Tyler was an Art or Mystery used in *England* at the Time of making the Statute. *Sed per Holt* C. J. The very Trade is mentioned in this Statute, and therefore it must necessarily be intended that it was used at that Time. He likewise cited 1 *Lev.* 243. *Cro. Eliz.* 187. The Court seemed to think the Averment necessary, and so are the express Words of the Statute, *viz.* to use or exercise any Craft or Mystery now used or occupied within the Realm of *England*. *Vide* 5 *Eliz. c.* 4. 1. 31. And by the Statute of Union the Name is now changed into the Kingdom of *Great Britain*, and it ought to have been alledged in the Indictment, and therefore the Indictment was quashed for the Reasons above.

Byron *and* Phillips.

Execution.

FOR Execution *de bonis propriis* against an Executor. Judgment being had against Testator, and a *Devastavit* found. Defendant pleaded *Plene Administravit* before the Return of the Writ, but shewed not how he had administred as he ought to have done. *Cro. Eliz.* 577. *Salk.* 266. *Werg econ.* Objected to the first *Fieri Facias*, that there did not appear that there ever was a *Scire Facias* upon the Judgment.

Ch. Just. There ought to be a *Scire Facias*

to make the Defendant Party to the first Judgment, and that he might have a Day to plead, for he might have a Release. This is an Execution against one not made Party to the Writ. And Judgment was given for the Plaintiff, unless Cause before the End of the Term. *Vide* Case of *Guibert* and *Jones*, *Post*.

(213.) Buckle *v.* Brown. Pasch. 5 Geo. 2.

Replevin.

IN Replevin, the Lieutenant of Militia for the County of, *&c.* made a Rule by Virtue of a Power given him so to do by 13 & 14 *Car.* 2. *c.* 3. by which the Plaintiff, a sworn Attorney, was charged with the Payment of 2 *s.* and his Landlord with the Payment of 2 *s.* 6 *d.* more. A Distress for Default was made upon the Goods, *&c.* The Plaintiff replevies; Defendant avows under the said Act, and to this Avowry, Privilege and no Notice to the Landlord of the Assessment was pleaded in Bar, after first having obtained a Rule of Court for Leave to plead it accordingly.

Lofield *v.* Bancroft.

Action for a Libel.

ACTION for a Libel. There were three Counts in the Declaration, the last of which sets forth, that the Defendant *malitiosé* charged the Plaintiff with Felony, *viz.* *Crimen Feloniæ imposuit pro procuration' in poculis*, *Anglicé*, picking his Pockets, and *postea*, *scil.* he caused

caused him to be arrested and imprisoned for said Felony. The Jury found the two first Counts for Defendant, and the last was found for Plaintiff, and Damages accordingly. It was moved in Arrest of Judgment, that it was nowhere shewn in the last Count that the Libel was published and spoken of the Plaintiff; and it is held in *Cro. Jac.* 126. that an innuendo in this Case would not assist the Declaration. 2*dly*, It is said *pro procuration' in poculis, Anglicé*, picking his Pockets; whereas *poculum* is *Latin* for a Cup, and wherever there is a proper *Latin* Word, *Anglicé* will not avail, as in this Case it ought to have been *pro procuration' in Loculis.*

It was answered by the other Side, that if the Word *poculis* be rejected it will stand thus; *pro procuration' Anglicé* picking his Pockets, or reject the *Anglicé*, and then it will be for picking out of Cups, and either way it will be good. As to the first Objection, it was said that here are two distinct Counts; that an Action will lie for publishing a Libel, and an Action will likewise lie for charging a Man with Felony; so that the Facts being in themselves distinct and separate, the Counts must be taken to be so likewise; and if so, the Declaration will be well enough; for it is expresly alledged that he caused the Plaintiff to be arrested, *pro Felonia prædict'*.

Upon looking into the Record, it appeared that the Verdict was found upon the whole third Count, and Judgment was arrested by the Court for the Reason above. 2 *Keb.* 154. *Yelv.* 68.

(214.) Rotherford *v.* Scot.

Libel Admiralty Court.

THE Defendant was Libelled against in the Admiralty Court in 1000 *l.* Damages; he was afterwards charged by the Plaintiff in an Action of Debt of 25 *l.* in *B. R.* and was now brought up by *Habeas Corpus*; an Affidavit being made of the *Quantum* of the Debt. And Mr. *Hagar* moved that he might be committed to the Custody of the Marshal of the King's Bench Prison.

Mr. *Strange cont.* and said, where two Courts have several Jurisdictions, and there are several Causes of Action in each Court against the same Defendant, that Court shall have the Custody of him which first gets hold of him.

Cur': It does not appear what the Cause of Action is; it it only said in general *Causa damni sive spolii Civili maritimæ*; and it may be perhaps such a Cause of Action, as this Court will give the Plaintiff below a Remedy for. If this Practice should prevail, it will destroy the Jurisdiction of this Court; for the Admiralty may continue on their Process *ad infinitum* without going on to Trial, and by that Means the Plaintiff in *B. R.* may be defeated of his Debt. The Court made a Rule for Defendant to be brought up the first Day of next Term, and in the Interim to give the Admiralty Notice. And *Trin.* 5 & 6 *G.* 2. the Defendant was brought up, and committed a Prisoner to the *Marshalsea* Prison. See 2 *Strange* 936.

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The King *and* Thomas.

INFORMATION for stopping a Highway, leading from *Molton Hindmost* in the County of *Gloucester* to *Woodstock* in *Oxfordshire*, and Verdict against Defendant. Mr. *Abney* moved for a new Trial, and objected, that the Information being laid as a Way for Waggons, Carts and other Carriages timely immemorial, it ought to have been proved that Waggons, *&c.* had passed timely immemorial from *Molton Hindmost* to *Woodstock* and back again, and said there was no Evidence to this Purpose. 2d Obj. That in the Information the Highway is set forth as a Road leading from *M.* to *W.* whereas the Town does not go by that Name; nor is there any such place as *Woodstock*, but it is called *New Woodstock* or *Old Woodstock*, so that the Information is of itself insufficient. *Highway.*

Raymond C. J. If the Place is so well known by the Name of *Woodstock*, that is well enough; and tho' the Evidence did not go so far as to prove that they had seen Waggons, *&c.* go from *M.* to *W.* yet if they had (215.) seen them passing and repassing that Way, he thought that was good Proof of Prescription. And Mr. J. *Page* (before whom the Cause was tried) affirming that the Evidence did prove so much, the Motion was denied *per Cur'*.

Bishop

Bishop of London *v.* Mercers Company.

Trin. 5 & 6 Geo. 2.

Quare Impedit.

QUARE Impedit, and Judgment for Plaintiff; a Writ of Error brought, and Judgment affirmed. Serjeant *Belfield* moved, that the Defendant in Error might have his Damages and Costs *pro dilatione executionis*, according to the Provision of 3 *H.* 7. *cap.* 10. by which Statute it is enacted, That if the Defendant or Tenant before Execution sue out any Writ of Error to reverse Judgment in delay of Execution, that in that Case if Judgment be affirmed, or the Plaintiff in Error nonsuited, *&c.* the Defendant in Error shall recover his Costs and Damages for this Delay and wrongfully Vexation at the Discretion of the Justices; and cited a Case in *Cro. Car.* 145, 175, where Damages were given in a Writ of Error in *Quare Impedit* to the Value of the Living.

Mr. *Fazakerly cont'*: The Question in this Case arises upon the 3 *H.* 7. *c.* 10. which Statute gives Costs, *&c.* where none were before given by the Common Law; and wherever a Statute is introductory of a new Law, nothing shall be construed to be within the Equity of the Act, but only what is within the express Words of it; and said by Lord *Hobart*, that such an Act is a Negative, and excludes all other Cases than such as are expressly mentioned in the Act itself: The Court will therefore judge whether this is such a Writ of Error as falls within the Description of

of the Act; and if it does not appear to be brought to delay Execution only, and create Vexation and Trouble to the Defendant, it cannot be such a Writ as falls within the Intention of the Statute. It is in the Memory of the Court, with what Solemnity this Case was argued, and what strong Objections were made in Support of the Errors; and tho' they were at last overruled, yet the Court took a considerable Time to consider of their Judgment. It cannot therefore be conceived that to delay Execution only, or that any other vexatious Intent could be the Inducement to the Party to bring his Writ of Error, and consequently does not come within the Description of the Act. In the Case of *Smith* and *Smith*, *Cro. Car.* 425. Error of a Judgment in *Formedon* in Remainder, and the Judgment affirmed; and because this Writ was brought before Execution, and thereby Execution delayed, it was moved to have Costs assessed to the Defendant according to the 3 *H.* 7. But it was adjudged, that forasmuch as there were no (216) Costs or Damages recovered or allowed in the first Action, so that no Execution is delayed by, only for the Land, that in this Case no Costs are allowable by the said Statute. So it is plain that no Costs are to be given for the Detention of the Land, or to the Suspension of the Profits of the Living by the Writ of Error, but only for the Suspension of the Damages which are to be recovered by the Judgment; and if they meant no more than this, we should not then have litigated the Matter with them. If the Value of the Living

ing is to be the Measure of the Damages in this Case, the Plaintiff will have a double Satisfaction in Value. By the Stat. of *H.* 8. where a Sequestration is appointed, he is to account with the next Incumbent for the Reception of the Profits; and we have an Affidavit that a Sequestration hath been appointed. I would gladly know what Damage the Patron, who is Defendant, can have sustained in this Case. Supposing there had been no Writ of Error, the Profits of the Living must have gone to the Incumbent. He is delayed indeed in his Right of Presentation, but that is not a Thing accountable for. If this Construction should prevail, it will in a Manner take away all Writs of Error; for when so severe a Penalty attends them as the Value of the Living, it will deter all People from bringing them notwithstanding the Writ should in Truth be brought to try the Opinion of another Court. 1 *Vent.* 88. *Foot* v. *Berkly.* Judgment in Ejectment, Writ of Error brought and Judgment affirmed; *B.* prays Costs for his Delay and Charges, but could not have them, for no Costs were in such Case at Common Law; and the Stat. 3 *H.* 7. gives them only where Error is brought for Delay of Execution; and tho' he had not Execution of his Term, yet he had it of his Costs.

Serjeant *Belfield* and Mr. *Strange* by way of Reply—Two Points are insisted upon by Mr. *Fazakerly*; first, that no Damages are given by the Statute in this Case. And his 2d Objection is to the Measurement of them. It is insisted

insisted, that the Statute must be construed strictly, being introductory of a new Law; but this is a remedial Law to prevent Delays in Execution, and therefore to be explained liberally. The Court won't inquire *Quo Animo* the Writ of Error is brought, but by the Event of the Writ. As to the second Objection, the two Cases cited out of *Crooke* sufficiently prove the value and *Quantum* of the Damages that are to be recovered by the Plaintiff in this Case, that they shall be the full Profits of the Living as found by the Jury, and no Deduction for Allowance to a Curate in the Interim for supplying the Cure. As to what is objected, that a Sequestration is appointed who must account to the next Incumbent, that is not the present Question; it is what the Plaintiff is intitled to, and not what a third Person may be intitled to. Advowson is Assets, and to keep out the Clerk is a Damage to the Patron.

Lord Chief Justice Raymond: This Case requires some Consideration; the Act of Parliament that gives Damages in this Case is a remedial Law to prevent Delays in Executions, but not to be taken strictly in a limited Sense. The Court are not to determine *Quo Animo* the Writ of Error is brought, but must judge by the Event. The Statute indeed leaves it to the Discretion of the Justices, but that is only as to the *Quantum*. It does not appear what Damages can have accrued to the Patron by this Delay. To make the Plaintiff in Error answer so largely as the Value of the Living amounts to, seems to be (217.)

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a hard Construction. *Page* and *Probyn* of the same Opinion. *Sed adjournatur.*

And the Court afterwards gave Judgment, and resolved that the Value of the Living should not be given in Damages, but only the Interest of the 70 *l.* being the Damages recovered in the *Quare Impedit*; for had there been no Writ of Error brought, the Clerk, and not the Patron, who is the Plaintiff, must have had the Profits of the Living, therefore the Patron has sustained no Damages upon that account by the Delay of Execution: But the Damages intended by the Statute in this Case arise from the Delay given to the Plaintiff in preventing Execution of the Damage given upon the *Quare Impedit.* And because the Writ of Error had been depending three Years, adjudged that Interest at 5 *l. per Cent.* should be paid from the Time the Writ of Error was brought to the Time that Judgment was given upon it. *Vide Cro. Eliz.* 659. *Penruddock* and *Clerk.*

The King *v.* Inhabitants of St. Giles's Parish.

Order of Sessions.

UPON Motion to quash an Order of Sessions, Case was this: *Anne* the Mother having gained a Settlement in *St. Clements Danes*, marries and hath a Child; afterwards she marries a second Husband, who was settled in another Parish. By Order of two Justices the Child was sent to *St. Clements Danes*, being the last legal Settlement of *Anne* the Mother

Mother. Upon Appeal to the Seſſions this Order was quaſhed, and the Child ſent back again to the Pariſh where the ſecond Huſband was ſettled. Both theſe Orders being removed by *Certiorari* into *B. R.* the Order of the two Juſtices was confirmed, and the Order of Seſſions quaſhed: Becauſe if a Widow having Children, marries a Man of another Pariſh, the Children ſhall not go with the Mother but for Nurture, and after they gain a competent Age, they ſhall be ſent back to the Pariſh where the Mother was ſettled; for ſhe cannot gain a Settlement for them in this laſt Pariſh, becauſe under Coverture, and having a Settlement there herſelf as Part of her Huſband's (218.) Family, from whom ſhe cannot be ſevered. *Vide* 2 *Salk.* 528. *Inter the Inhabitants of Cumner* and *Milton.*

Lowet & Ux' *v.* Busby.

Debt upon Bond.

ACTION of Debt upon Bond payable at a future Day. Defendant pleaded that he became a Bankrupt in *February* 1728. *viz.* on ſuch a Day, and that the Cauſe of Action accrued before the Bankruptcy. Plaintiff prays that the Bond and Condition may be inrolled, by which it appears that the Breach of the Condition was ſubſequent to the Bankruptcy, and then he demurs generally, and ſhews for Cauſe that the Breach of the Condition was ſubſequent to the Bankruptcy, and that the Money due upon the Bond was not payable till afterwards: For altho' the Bond

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is *debitum in præsenti*, yet it is payable only *in futuro*, and the Plaintiff could not have put it in Suit at the Time of the Bankruptcy. The Defendant in this Plea hath not pursued the Words of the Statute: By 3 *G.* 2. *c.* 29. the Party shall be discharged only from the Time he is declared a Bankrupt; and a Person may become a Bankrupt before the Time he is declared, and therefore should expresly aver in his Plea, that he was a declared Bankrupt *post causam Actionis*, *&c.* For whenever a Person claims the Benefit of an Act of Parliament, he must shew himself intitled to every Thing he claims by the Act; and cited the Case of *Collowell* and *Clutterbuck*: Action upon a promissory Note payable at a future Day; Defendant pleaded Bankruptcy in Bar; and upon Demurrer it appeared the Note became payable after the Time of Bankruptcy; and tho' it was insisted the Note created a Debt notwithstanding it was payable at a future Day, and that a Release would have extinguished it, yet it was objected that the Bankruptcy was no Bar, the Note not being payable till afterwards.

Mr. *Draper cont'*: The Plaintiff should not have demurred. By the Statute the Defendant is obliged to tender an Issue, which he hath done in this Case, by pleading that the Cause of Action accrued before the Bankruptcy; and had Plaintiff joined Issue, he might have given all this Matter in Evidence. The Defendant's Plea is good if within any of the Acts now subsisting. And by 7 *G.* 1. *c.* 31. the Plaintiff was intitled to a rateable Part

Part of the Bankrupt's Estate, tho' the Bond was payable *in futuro*. *Vide* Case of *Tully* and *Sparks* [Ld. Raym. 1546], where Bankruptcy was held no Bar, because the Case depended upon a Contingency, and the Plaintiff not intitled to distributive Share upon such a Bond. The Court said there was a Difference between Debts upon Bond and Promissory Notes. *Sed adjournatur.*

Beach *v.* Bourn. (219.)

Libel in the Spiritual Court.

THE Defendant being libelled against in the Spiritual Court for acting as a Parish Clerk, he applied to this Court for a Prohibition; and the Case having been argued several Times, it was now again spoke to by Mr. *Filmer* and *Fazakerly*. *Filmer* for the Defendant argued, that three Things were to be considered in the Determination of this Affair, *viz.* Whether the Office of a Parish Clerk was a Temporal or Spiritual Office. 2*dly*, Supposing him a Spiritual Officer, whether the Ecclesiastical Court could oblige him to take out a Licence to officiate. And 3*dly*, Whether or no he could appoint a Deputy. He said it was agreed upon the last Argument, that the Manner of his Election, whether by the Parson or the Parishioners, made no Difference as to the Nature of his Office; but it seems incredible, if he is a Spiritual Officer, that the Parishioners should ever have obtained a Power of electing him. In *Gibson*'s *Codex* he is said to be a Spiritual Officer,

Officer, but no Authority cited to support this Doctrine; there are a great many Cases in our Law-Books where this Office is taken Notice of, and in all of them he is held to be a Temporal Officer. 13 *Rep.* 70. 2 *Cro.* 670. *Palm.* 379. *Keb.* 289. *Marsh* 101. *Godb.* 163. *Old Bendl.* 142. which Case was determined *Hil.* 22 *Jac.* 1. *Leon.* 24. *Fitz. Abridg.* Tit. *Annuity* 40. *Hughes's Parson's Law* 275. where an Annuity was granted to a Man until he was promoted to a Benefice; and in a Writ of Annuity brought by the Grantee, the Defendant alledged that the Plaintiff was made by him the Clerk of such a Parish Church; and it was ruled to be no good Plea to bar him of his Annuity, for that the Clerk of a Parish was but a Lay Officer and removable at the Pleasure of the Parishioners; and he urged the last Case as a Case in Point. As to the second Point he said that the Clerk was not obliged to take out a Licence, let his Office be either Spiritual or Temporal. *Can.* 1603. puts the Judgment of the Clerk's Abilities in the Minister; but there is no Law of Canon that obliges him to take a Licence from the Ordinary to permit him to officiate; and this being the Foundation of the Prosecution, it is incumbent upon them to shew how the Ordinary came to have such a Jurisdiction. As to the third Point, he said that was not necessary to be determined in this Case; but there is a Difference between a Deputy and the Assignee of an Office. 9 *Rep.* 48. Tho' the Office is Spiritual, yet the Right is Temporal. *Roll.*

Rep.

Rep. 274. 2 *Roll. Abr.* 285. 2 *Brown* 11.

Mr. *Fazakerly cont':* The Case in *Fitz* and *Hughes's P. L.* destroys itself, because he is there said to be an Officer removeable at Pleasure of the Parishioners, whereas it has always been adjudged the contrary; for that it is an Office for Life, and thereby he gains a Freehold. *Hil.* 8 *Ann. Mallard* and *Smith*; where a Parish Clerk sued in Spiritual Court for a Pension, and a Prohibition being mov'd for, it was held that he was an Ecclesiastical Officer, and might sue in the Spiritual Court, *&c.* The Proceedings below are not against him as an Officer or Parish Clerk, but he is libelled against for taking upon himself to exercise a divine Office without any Authority. If one may intrude himself into a Church, another may; and unless the Spiritual Court have a Jurisdiction in these Matters to punish such Disturbances, who can? (220.)

By the Court: The Libel against him is not for a Disturbance, but for intruding into the Office, and performing Divine Service on *Sundays*, *&c.* without Licence; but no Misbehaviour is alledged.

Mr. *Fazakerly:* Where a Person intrudes, and continues to officiate, it is the Business of the Ordinary to see by what Authority he does; for barely to officiate without Authority is a Disturbance. Supposing the Spiritual Court to have a Jurisdiction, this Power is incident to it; and whether a Licence is necessary or not, is proper for the Determination of that Court; and if a Licence is not necessary,

neceſſary, that will be a proper Defence for the Defendant in the Courts below. As this is a Proſecution for intruding into a Divine Office, it is properly cognizable in the Spiritual Court; for it is not pretended there is any Remedy againſt him elſewhere, which is a ſtrong Inſtance that the Remedy muſt be in the Spiritual Court. 1 *Vent.* 64. And to ſhew the Spiritual Court had a Juriſdiction, he cited the Caſe of *Townſend* and *Thorpe* [Ld. Raym. 1507], which was a Libel in Spiritual Court againſt a Pariſh Clerk, charging him with ſeveral Temporal Crimes, as Swearing, Drinking, *&c.* This Court ſtaid Proceedings only in that Caſe, until the Defendant was found guilty by Indictment for the ſame Crimes, and then ſuffered the Spiritual Court to proceed to Deprivation, which this Court would not have done ſuppoſing they had no Juriſdiction.

Mr. *Filmer*'s Reply: It is not pretended there is any Law or Canon to force the Defendant to take out a Licence, and yet this is the Reaſon and Foundation of the Proſecution. Here is no Crime charged againſt him; had he been guilty of Miſbehaviour, the Spiritual Court might have had ſome Reaſon for this Proſecution. In the Caſe of *Townſend* and *Thorpe*, Diſtinction was taken where the Clerk was elected by the Parſon, and where by the Pariſhioners; and it was there ſaid the Nature of the Office followed the Manner of the Election; and in that Caſe the Spiritual Court proceeded by Conſent; for upon this Court's ſtaying Proceedings pending the Indictment, the Defendant agreed that the Spiritual Courts

Court ſhould proceed afterwards; but that was by Permiſſion only; and then the Prohibition ſtood *quoad* the Puniſhment, and the *Procedendo* granted only *quoad* Deprivation. (221.)

By the Court: The ſingle Queſtion in this Caſe is, whether a Licence is neceſſary or not; here is no Diſturbance complained of, which would have much altered the Caſe; for a Miſdemeanor may be puniſhed below let the Office be either Spiritual or Temporal. If he can't act without a Licence, this in Effect gives the Ordinary the Right of Election. In Chief Juſtice *Holt*'s Time a Clerk ſued for his Salary in the Eccleſiaſtical Court, and a Prohibition was granted, for the Court held him to be a Lay Officer; Anonymous Caſe cited by *Lee* Juſtice: But there is no Occaſion to determine that Point now. He certainly was not *inter minores Ordines*; nor was there originally any ſuch Officer. *Vide Inſtitutio Juris Canonici* 22. But there being no Caſe cited to prove a Licence neceſſary, the whole Court adjudged the Prohibition to ſtand.

Cooper *v.* Norman.

Writ of Error.

JUDGMENT in *C. B.* againſt the Defendant, who brought a Writ of Error, pending which the Plaintiff became a Bankrupt, and an Aſſignee being appointed under the Commiſſion of Bankruptcy, he brought a *Scire Facias ad aſſignandos Errores* by the Defendant, who now came and prayed *Oyer*

of the *Scire Facias* in order to controvert the Appointment of the Plaintiff as Assignee of the Commission; and cited *Mod. Rep.* 93.

Mr. *Parker cont':* The Defendant is not intitled to have *Oyer*, nor can he contravert the Bankruptcy, as was adjudged in the Case of *Miles* and *Wilmot*, 5 *G.* 2. *Mich.*

This is no more than the common Case when Judgment is recovered by Testator, who dies pending a Writ of Error, *&c.* His Executor brings a *Scire Facias* to assign Errors, the Defendant in that Case cannot claim *Oyer.*

The Court refused to grant *Oyer*, and the Rule that had been obtained was discharged.

The King *and* Holland.

Order of Sessions.

TO quash on Order of Sessions. Two Objections were made to the Order; 1*st*, That this was said to be an Order made in the City of *Worcester*, and it does not appear in what County the City of *Worcester* is; and 2*dly*, It does not appear that the Party was summoned. But both these Objections were overruled. The City of *Worcester* is a County of itself, and the Court *ex Officio* takes Notice of all Counties; and it is alledged in the Margin to be *in Com' Vigor'*, *Pasch.* 11 *Ann.* *Queen* v. *Philips.* *Mich.* 4 *G.* 1. *King* and *Blackwell*, both Orders of Bastardy. *Mich.* 8 *G.* 1. *King* and *Clagge.* As to the second Objection, the Court had frequently overruled it, being contrary to common Justice to condemn a Man unheard; and the Court won't

(222.)

won't intend this, for if the Party was not summoned, he may take Advantage of it, and the Court upon Affidavit will set aside the Order for want of it. Note; This was an Order of Bastardy; and Mr. *Parker* objected, that it did not appear how old the Bastard was; but the Order was general, and that the Defendant being the reputed Father, should maintain it as long as it became chargeable, or till further Order. *Sed non allocatur*; for the Father is obliged to maintain him so long as he remains uncapable of providing for himself, and the subsequent Words, until further Order, import no more than that he shall maintain him, *&c.* unless he should be ordered to the contrary. There was another Objection, that if the Court take Notice of the City of *Worcester* as a County itself, that the Order was ill, because it is made by the Justices of the County at large, and yet said to be at their Quarter-Sessions *tent' apud* the City of *Worcester*; so that it appears upon the Face of the Order to be out of their Jurisdiction. But this Objection was likewise overruled, for there is an Exception in the Act for this Purpose; and so the Order of Sessions was confirmed by *Page* and *Probyn*, *Absente Raymond* C. J. and *Lee*.

Paul *and* Knight.

Policy of Insurance.

ACTION upon a Policy of Assurance in the Mayor's Court at *Bristol*. Defendant pleaded *Non Assumpsit*, upon which they

were at Issue. A Jury was summoned regularly, but at the Trial there was a *Defectus Juratorum*, whereupon a *Tales de Circumstantibus* was awarded, and a Verdict for the Plaintiff. The Defendant brought Error, and assigned for Cause, that notwithstanding the *Tales* is said to be returned *secundum Consuetudinem Civitatis prædict'*, and *Statut' in hujusmodi Casus provis'*, yet such a Custom cannot be good, because contrary to Law; and the Statute which gives a *Tales* does not extend to inferior Jurisdictions, but only to Courts of Records.

Mr. *Draper*, who argued this Point, gave an Historical Account of Trials by *Tales*; and cited the *Stat. Westm.* 2. 42 *Ed.* 3. *c.* 11. and 32 *Hen.* 8. And to prove that Customs which were contrary to Common Law were not good, he cited *Cro. Car.* 259. *Roll. Abr.* 563, 564. *P.* 4, 5. 11 & 17. 9 *Rep.* 13. *Dowman's* Case. *Yelv.* 214. *Style's Rep.* 16. 2 *Roll. Abr.* 672.

(223.) Serjeant *Eyre cont':* The Question in the present Case is, whether Trials by a *Tales de Circumstantibus* in inferior Court *secundum Consuetudinem* be good by Custom or not. It is objected, that this Custom is not good because contrary to the Course of Common Law: but this is no Reason to destroy the Sufficiency of a Custom, for *Consuetudo vincit Communem Legem.* But the proper Question is, whether this Custom is reasonable or not. And the Statute which has been cited by Mr. *Draper*, and which gives a *Tales*, sufficiently proves the Reasonableness of this Custom, otherwise

otherwise the Act of Parliament would not have impowered any Jurisdiction to grant it. He cited several Cases to shew that Customs which have been contrary to the Proceedings at Common Law have been adjudged good. *Roll. Abr.* 564. *Cro. Eliz.* 894. 1 *Mod.* 96. And the Custom which is reported in 1 *Roll. Abr.* to be ill, because contrary to Common Law, is reported otherwise in 2 *Roll. Abr.* 672. with a *Dubitatur*, and so concluded this Point, that the Custom in this Case seemed reasonable, not only from the Nature of the Thing, because conducive to the Expedition of Justice, but also because the Legislature had thought proper to establish it.

Raymond C. J. This is returned a Custom Time out of Mind; then the Question is, whether reasonable or not; for it being contrary to Common Law will not vitiate it: For unless it was contrary to Common Law, it would not be a Custom; and it is a strong Argument of the Reasonableness of this Custom, because the Parliament have thought proper to establish it. Before the Statute of Wills, Lands were not devisable by Common Law, and yet they were so by Custom; and the Act of Parliament is a Confirmation of the Reasonableness of it. There are several Corporate Towns which at this Day claim the same Custom; and what would be the Consequence if we should now overthrow it. *Bristol* and *Colchester* were said to have Trial by a *Tales*, and that this had prevailed Time immemorial. And this Case being argued over again

again at another Day, Mr. *Wright* insisted for the Plaintiff in Error, that Trials by *Tales* were not good and allowable by Custom; for Customs which are against Law, and the Reason and Policy of the Law, cannot be reasonable, and therefore are not good. A Custom is a reasonable Act that hath been continued Time out of Mind, and by constant Usage allowed or allowable by Law. But a Trial by *Tales* is not allowable by Law, and therefore un-unreasonable. 2 *And.* 152. A Custom against common Right is not good. 1 *Roll. Abr.* 565. *p.* 9. It is not a good Custom for a Court to award a *Capias* in an Action of Debt, or any such Writ, before a Summons hath been awarded, for this is against the Course of the Common Law. 1 *Roll.* 563, *p.* 11. No Usage or Custom can be allowed to run against the King's Prerogative. *Da.* 36. 1 *Roll. Abr.*
(224.) 566. And the Reason is not because *Nullum Tempus occurrit Regi*, but because the Prerogative is Part of the Common Law, and so considerable a Branch of it, that no Custom shall be suffered to prevail against it. It is not a good Custom, that if a Man becomes Bail in *London*, and the Plaintiff recovers against the Principal, and sues out a *Capias*, whereupon the Sheriff returns a *Non est Inventus*, that immediately upon this Return without any *Scire Facias* against the Bail, the Bail may be taken in Execution upon his Recognizance; for this is against Law and Reason, because had he sued out a *Scire Facias* against the Bail, they might have pleaded a Release or Death of the Principal. *Roll. Abr.* 563.

563. *P.* 13. This shews that the Law will not suffer its Rules to be broke, nor Usage to prevail against them. *Dyer* 357. *Roll. Abr.* 553, 558, 563. *Palm.* 211, 212. *Moor* 8. 2 *Roll. Abr.* 549. *Dav.* 53. 2 *And.* 152. 2 *Inst.* 46, 47. Law and Reason in respect to Custom are synonymous, and whatever is contrary to the legal Custom and Usage of the Law, must be unreasonable, because contrary to the Policy and Reason of the Law. Custom of inheriting by *Borrough English* and Gavelkind good and allowable, not only because no Prejudice can arise by such Customs, but because the Commencement of them was antient as the Law itself. *Salk.* 251. He further argued, that admitting the Custom good, yet it is ill pleaded in this Case, for it does not appear the Parties have the benefit of Challenge. It is only said, that by Custom Standers-by may be sworn in. By Common Law, an Alien, Villain, or infamous Person, cannot be a Juror; and in the present Case a Stander-by having all these Disabilities might be sworn in and become a Juror contrary to the Will and Intention of the Parties, for the Custom gives no Challenge; and this Defect is not aided by the subsequent Words *Secund' formam Stat'*, for provided there be no such Statute the Words are not available; and if a Statute, it cannot aid in this Case; for it is alledged to be a Custom which cannot be by Statute, for a Custom cannot commence within Memory. Custom to try in inferior Courts by six Jurors only is not good; and so it was expresly held in *Roll. Abr.* 564, altho' it appeared

appeared by Certificates, that more than 20 Courts in *Cornwall* held Trial by the same Custom; and so is *Cro. Car.* 259. 1 *Sid.* And the Reason is not because this Way of Trial is against natural Reason, but because it is against the Reason of the Law. The Statute of 32 *H.* 8. does not commend Trials by *Tales*, but only gives a discretionary Power to the Justices to name other able Persons of the same County at the Prayer of the Party; but being a Stander-by is no Qualification. And it is not said that by Custom the *Tales* must be *ex Civitat' prædict'*. *Communis Error facit Jus*; but that Maxim establishes general Errors only, and not such as are local; for should the Construction prevail, no Custom
(225.) so absurd but might be established by it. Those Cases that have been cited in Support of the Custom, *Cro. Eliz.* 894. *Mod.* 96. 1 *Roll. Abr.* 564. are only Cases varying from the common Rule of Remedy, but not varying from common Rules of Right and Justice, and so concluded that the Custom in this Case was unreasonable and void.

Mr. Serjeant *Prime cont'*: All Customs that are in themselves reasonable and beneficial to the Publick are good Customs. This Custom is in itself reasonable, and must now be construed so to be, because since established by the Statute. And the 5 *Eliz. c.* 5. says, this Statute which establishes Trials by *Tales* is a good and beneficial Law; and therefore the 5 *Eliz.* provides that it shall be extended into the counties of *Wales*; and this is the strongest Argument in Support of the Reasonableness of

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a Custom. The Reason why it is not a good Custom to arrest upon a *Capias*, *&c.* is, because it would be unreasonable to take a Man into Custody, and deprive him of his Liberty, without having first summoned him. So a Trial by 6 Jurors is expressly contrary to the Common Law. But where there are 12 Jurors, whether they be returned upon the Panel or supplied by a *Tales*, it is still a Trial by 12, and agreeable to Trials at Common Law. 2 *Roll. Abr.* 672. This is held a good Custom, and is a Determination subsequent to the Resolution in the first Part of his Abridgment; and in a Book called *Trials per pais*, it is laid down as a stated Rule that such Trials are good. All Customs that are useful and tend to the Expedition of Justice are good; and this is the Foundation of the Custom in the present Case.

Cur': Whether or no such a Custom is good is not necessary to determine in the present Case; for the Custom as alledged in the present Case is ill pleaded. It is only said *per Consuetudinem Jurati & Triati.* But it does not appear the Parties are by this Custom intitled to a Challenge. All Trials at Common Law must be *per pares*; but according to this Custom, as it is now pleaded, any Stander-by, notwithstanding he is otherwise disqualified, may become a Juror; therefore such a general Custom cannot be reasonable; and so Judgment was reversed. Note; The Words of the Entry in this Case were as follows: Seven of the impanelled Jury only appearing, *Et quia residuum ejusdem Jurat' non Compar', ideo secundum*

dum Consuetudinem Civitat' prædict', alii de Circumstantibus per servientem ad Clavam Civ' prædict', ac Ministrum Cur' hic prædict', ad hoc electi ad Requisition' præfat' querent' per Mandatum Cur' hic de novo apponuntur, quorum nomina in panello ultim' mentionat' affilentur in Cur' hic secundum formam Statut'.

(226.)

Read *v.* Chapman.

Libel in the Spiritual Court.

LIBEL in the Admiralty Court for Mariners Wages. Upon Motion for a Prohibition the Case was this: The Captain, who was Plaintiff, went out to Sea as Mate of the Ship; during the Voyage the Captain died, and was succeeded by the Mate, which came home as Captain, and then sued for his whole Wages in the Admiralty, as well those accruing to him as Mate, as for those that were due to him as Captain; and because the Captain cannot sue for his Wages in the Admiralty, being a Privilege allowed only to the Mariners, a Prohibition was moved for.

The Court said here were two distinct Causes of Action; the one upon the Special Contract that was made as Mate, the other upon the special Promise arising in Law to the Plaintiff as Captain for the Management of the Ship: And therefore they divided the Motion, and agreed that Plaintiff might sue in Admiralty for the Wages which accrued to him as Mariner; but for what is due to him as Captain, he must sue in the Courts of Common Law; and so granted the Prohibition as to that Part only.

Thrustout

Thrustout *v.* Holdfast.

IN Ejectment. The Lessor of the Plaintiff, in order to prevent the Statute of Limitation being given in Evidence, laid back his Demise so far as to bring his Entry within the Time limited by the Statute. Mr. *Fazakerly* moved that the Demise might be altered, and laid within such a Time as the Statute might operate upon it; for otherwise as the Demise is now laid, the Defendant will be concluded from giving it in Evidence upon the Trial; for when he confesses Lease, Entry and Ouster, he confesses every Thing but a Fine; and therefore the Entry being within 20 Years, as laid in the Demise, will Bar him of the Benefit of the Statute; and mentioned a Case that was tried before Mr. Baron *Carter*, where the Demise was laid 30 Years back; the Defendant offer'd to give the Statute in Evidence, but having confessed Lease, Entry and Ouster, he was concluded against his own Confession to say the Plaintiff had been so long out of Possession. But the Demise being laid 30 Years back, so that notwithstanding the Lease and Entry the Statute might have run; the Judge put it upon the Plaintiff to shew he had Possession within 20 Years, which he being not able to do, was nonsuited upon his own Demise. But in the present Case there being no Affidavit to verify that the Defendant had been in Possession 20 Years, the Court did nothing in the Motion. *Ejectment.*

Wish

(227.) Wish *v.* Chapman.

Action on the Case.

ACTION upon the Case in *C. B.* The Defendant pleaded, that the Vice-Chancellor of the University of *Cambridge* ought to have Conusance of the Action, and no other Court. The Court over-ruled the Plea, and upon the Merits of the Cause gave Judgment against the Defendant, who brought Error, but did not make the University a Party. Mr. *Reeves* moved that the Writ might be amended, and made agreeable to the Record, by making the Chancellor, Scholars, *&c.* of the University a Party to it; and founded his Motion upon 5 *G.* 1. *cap.* 13. The University appears by Record to be a Party concerned, and the Words of the Statute are general, *viz.* any Defect in the Record, *&c.* In the Case of the *Sword Blade Company*, *Mich.* 4 *Geo.* 2. a Writ of Error was brought and alledged that the Judgment was *ad grave damnum* of *Mary Edwards*, who was not a Party to the Record, and in that Case the Writ was amended.

Mr. *Strange cont':* Here is a Variance between the Writ and the Record, the University are not Parties to the Record, and therefore cannot now be made Parties: The Statute only enacts, that the Writ shall be made agreeable to the Record, so that it does not extend to this Case. In the Case of the *Sword Blade Company*, it was there said to be *ad grave damnum* of a third Person, who was not a Party to the original Action, and therefore

fore it could not be *ad grave damnum* of the third Person. It does not appear the University hath sustained any Injury by this Judgment, and therefore no Occasion to make them Parties.

Raymond C. J. Here are two distinct Judgments. The Defendant had brought Error upon that Judgment which extends to him; and the University may have Error upon the other Judgment if they think themselves injured.

Lee J. This is a Writ of Error brought upon a Judgment in *C. B.* and does not extend to the Judgment which goes in Disallowance of the Conuzance. Do you know of any Precedent where there hath been an Amendment of this Nature, where after Conuzance hath been disallowed, Judgment given upon the Merits of the Action, and afterwards Error is brought upon that Judgment? Do you know any Case where the Writ hath been amended by making a Person who is Party to the Conusance, Party in Error to the second Judgment?

Probyn J. The Defendant pleaded Conuzance which was disallowed, and Judgment given against him upon the Merits of the Action: The Defendant himself may be injured by this Action, but how does it appear to be *ad grave damnum* of the University?

Reeves: The Jurisdiction of the University (223.)
appears upon the Record to be called in Question, and that Jurisdiction denied, so that they are both made a Party to the Record and aggrieved by the Judgment. If they have no Right

Right of Conuzance the Judgment is good. The Court gave Time to search Precedents; and Mr. *Strange* said, Both Parties have searched for Precedents, and we cannot find any to warrant this Amendment. The Words of the Statute are, All Writs of Error wherein there shall be any Variance from the original Record, or other Defect; which must imply such a Defect in the Writ of Error as the Court cannot proceed to give Judgment upon the Record either to affirm or reverse it: But in this Case the Record is well removed, and the Court have a good Foundation to proceed upon. The Writ answers the Description of the Parties upon Record, and so no Variance.

Cur': The Words of the Statute are, *or any other Defect.* This appears plainly to be a Defect within the Act; by pleading Conuzance the University was necessarily made a Party to the Record, and the omitting them in the Writ is a Defect within the express Words of the Act. There is no Difference where the Writ is amended by adding a Party, and where a Party is struck out. Note; There was an Affidavit read that the University claimed Conuzance of the Action, and that they had given Directions, to have a Writ of Error brought upon the principal Judgment. For these Reasons the Writ of Error was amended, and the University made Parties to it.

Wigley

Wigley *v.* Peachy.

ACTION of Trespass for taking and carrying away several Cabbages, Colliflowers, and other Greens, *&c.* Defendant pleads that the Soil was the Bishop of *Winchester*'s, and he seized them Damage-feasant as Bailiff to the said Bishop. Plaintiff replies, that the King granted by Letters Patent to the Bishop and his Successors, a Licence for holding Fairs at such and such particular Days of the Week, and that one of those Days (setting forth the Day) he brought his Goods to the Market to be sold, and the Defendant, without any reasonable Cause, did take and carry them away. The Defendant rejoins, and demands *Oyer* of the Letters Patent, though not pleaded with a *profert hic in Cur'*; and then goes on and says, he seized them for not paying Toll. Upon Demurrer it was objected, that the Defendant hath not shewn that any Toll was demanded, nor does it appear what the Toll was. All Markets are in their own Nature publick and common to all the King's Subjects; all People may come upon the Soil to sell and buy, and an Action will not lie against them, nor are the Goods liable to a Distress. (229.) *Cro. Eliz.* 75. *The Mayor of Lawnson's Case.* Trespass against him for taking a Quarter of Corn; he justified, for that it was within the Town of *L.* and it was Damage-feasant in his Freehold. The Plaintiff pleads that a Market was granted by Letters Patent, and that the *Locus in quo, &c.* was appointed for

Trespass.

for the Market Place; and he brought his Corn on the Market Day, and set it there, and the Defendant took it. And upon Demurrer it was objected, that the Mayor could not justify the Taking it; so in *Cro. Eliz.* 627, 628. *Sawyer* and *Wilkinson*. If the Defendant had any Right of Toll, which shall be determined by the Judges if it comes judicially before them, and if unreasonable, punishable by the Statute. 2 *Inst.* 222. But the chief Objection was, that no Toll should be paid *de Communi Jure* for Things brought to the Fair or Market unless they be sold, and then the Toll must be taken of the Buyer: But in antient Fairs and Markets, Toll may be paid for the Standing in the Fair and Market tho' nothing be sold. 2 *Inst.* 220. 2 *Roll. Abr.* 123. 2 *Lutw.* 1329. *Leigh* v. *Pym*. The *Six Carpenters Case* was also cited, 8 *Rep.* 146. But to what Purpose or how applicable to the present Case, *Quære*.

Serjeant *Belfield cont'*: It does not appear by the Plaintiff's Replication he hath any Title to the Lord's Soil. Because it was made a Fair by the King's Letters Patents, it does not follow *inde* that the Lord's Soil is given to the Publick, or that the Plaintiff may commit a Trespass thereon without making the Lord a Satisfaction. The Replication therefore is defective, for the Plaintiff is bound of common Right to pay Stallage, which must be tendered before he can set down his Goods or expose them to Sale. 2 *Roll. Abr.* 123. If a Man hath a Fair in a Place, they who have houses next adjoining to the Fair cannot lawfully

lawfully open their Shops to sell Commodities, but Stallage is due for it, for they cannot take the Benefit of the Fair, without paying the Duties to him who hath purchased it; *a fortiori* where the Soil belongs to the Lord. To this it was answered, that the Stallage was not incident to the Fair, but to the Land. *Vide Moor* 474. And a Man may have the Market that is not Owner of the Soil. 11 *H.* 6. 23.

Cur': Here are two Points necessary to be considered, whether Stallage is due of common Right; and in the next Place, whether a Tender is necessary before the Goods are exposed to Sale. There is no one Case cited to support either of these two Questions; and the Case in *Roll. Abr.* seems to be a pretty extraordinary one. The Lord might as well claim Toll for the Shopkeepers looking out of their Windows. The Stallage as it is claimed by the Plea is claimed as incident to the Fair, and not as incident to the Lands. *Sed adjournatur* for a Second Argument; and afterwards the Court made a Rule for Judgment for the Plaintiff, unless Cause. Note; Mr. *Draper* made use of *Carpenters Case*, to shew that a Man cannot be a Trespasser for a Non-feasance, in Objection to Plaintiff's Rejoinder, who pleaded that he seized the Goods Damage-feasant for Non-payment of Toll, whereas the Non-payment of Toll cannot make a Trespass, because a Non-feasance. (230.)

The King *and* Inhabitants of Loughborough.

Highways.

INDICTMENT for not repairing the Highway. The Court was moved for a special Jury, and the Parties by Agreement entred into a Rule not to take Advantage of Errors. After a long Trial, and examining a great many Witnesses on both Sides, the Defendants were acquitted upon the Merits of the Case; notwithstanding this the Defendants were again presented by a single Justice of a Peace for not repairing the same Highway; and upon these Circumstances Mr. *Fazakerly* moved that all Proceedings upon the Presentment might be staid. Shew Cause.

The King *and* Osborne.

Information for a Libel.

INFORMATION was moved for against the Defendant for publishing a Paper intitled, A true and surprising Relation of a Murder and Cruelty that was committed by the Jews lately arrived from *Portugal*; shewing how they burnt a Woman and a new born Infant the latter End of *February*, because the Infant was begotten by a Christian. And then goes on and sets forth in the Body of the Paper a particular Account of the whole Transaction; and that the like Cruelty had often been committed by the Jews, notwithstanding an Act of Parliament made in the Reign of King *Car.* 2. to prevent Murders, &c.

&c. committed by the Jews. It was objected, that admitting that this Paper was libellous, yet the Charge was so general that no particular Persons could pretend to be injured by it.

Cur': This is not by way of Information for a Libel that is the Foundation of this Complaint, but for a Breach of the Peace, in inciting a Mob to the Distruction of a whole Set of People; and tho' it is too general to make it fall within the Description of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished. We don't give any present Judgment in this Affair, but think this is a Fact proper to be tried. Mr. *Strange* cited the Case of the *King* and *Orme*, *Trin.* 11 *W.* [1 Ld. Raym. 486] which was an Indictment for publishing a Libel reflecting scandalously upon several Ladies, but mentioned no one in particular; and Judgment was given against the Defendant, but afterwards the Court arrested the Judgment. But in the present Case several Affidavits were made, that this Paper had so much incensed the Mob against the Jews, that they had assaulted and beat in a most outrageous Manner the Prosecutor, who was a Jew. The Court made a Rule absolute for an Information. (231.)

Chapman *v.* Lamb.

ACTION of Trespass against the Defendant, who was a Custom-house Officer, for taking 15 Shirts, a Silk Night-gown and a *Trespass.*

Velvet Cap, the Goods of the Plaintiff. The Defendant justified that he was one of the Custom-house Officers, and that he seized the Goods, and carried them to the King's Warehouse, because the Plaintiff refused to pay Duty, *&c.* The Jury found that the Defendant was a Custom-house Officer, and that he had seized the Goods mentioned in the Declaration; they likewise found that these were wearing Apparel only which the Plaintiff brought from *France* for his own private Use; and upon the Whole they found that these Goods were not Mercantile, and therefore gave a Verdict for the Plaintiff with Damages. This Cause was tried before *Raymond* C. J. who at the Trial reserved this Point, *viz.* Whether these Goods being found to be for a private Use, and not Mercantile, were liable to pay Duty or not.

Mr. *Kettleby* for Plaintiff argued, That no Goods but Mercantile Goods were liable or subject to the Payment of Duty; and that the Statute of 13 & 14 *Car.* 2. did not extend to Goods bought for a private Use. That by the 22nd Section of this Statute it is enacted, That Vessels appointed to carry Letters, commonly called Packet Boats, may not import nor export Merchandize, upon the Penalty of the Forfeiture of 100 *l.* and that the Merchandize which shall be found aboard these Vessels shall be forfeited and lost; now it cannot be conceived that this Clause extends to Goods which are imported for private Use, and that a Passenger that carries a few Shirts and other necessary Apparel should be subject to such severe

severe Penalties. The Statute 12 *Car.* 2. whereby Tonnage and Poundage are granted to his Majesty, extends likewise to Mercantile Goods only; and the Reason they cannot by Implication be extended to any wearing Apparel, is because such Goods are necessary for the Conveniency of all Travellers and Passengers; whereas by the Construction that is contended for by the Defendant, a Man must not wear a Shirt to his Back, but if he comes from beyond Sea he must pay Duty for it; and cited *Vaugh.* 165. *Sheppard* and *Gosnold & al*, where *Vaughan* Ch. J. in his Exposition of 12 *Car.* 2. *c.* 4. says, that the Wines subject to Tonnage by the Statute must be imported as Merchandize, that is, for Sale, and to that End; for no other Conception can be of Goods brought as Merchandize; and in the present Case the Goods are expressly found not to be Merchandize, and are so stated upon the Point reserved. (232.)

Mr. *Reeves cont'*: Whoever imports Goods, whether he be a Merchant by Profession or not, is a Merchant within this Statute. It has been adjudged, that if a Person draws a Bill of Exchange he is a Merchant. 2 *Ventr.* 295. *Sarsfield* and *Witherly*. Common Usage is always allowed a good Exposition of an Act of Parliament; and it hath been the constant Usage where wearing Apparel hath been brought from beyond Sea to pay Duty for them tho' not brought as Merchandize. If the Exposition that hath been made upon the Statute by the Plaintiff's Counsel should prevail, the Consequence would be very prejudicial

dicial to the King's Revenue, if no Goods must pay Custom but what are Merchandize. It will in a manner exempt *French* Wines from all Duty; for they are taken the same Notice of in the Act of Parliament as other Goods; and if they must pay no Duty but when they are imported as Merchandize for Sale; then when Wines are imported by private Families for their own private Use, this will evade the Duty, and the King lose his Revenue, contrary to the Intent of the Acts of Parliament. Supposing a Man should have occasion to cloath his Family, and import Bales of rich Silks, (for they all fall under the same Description) must these Silks pay no Duty? This Construction would be such an Inlet into the Acts, that any private Person may import Goods without Payment of any Duty to the Crown, because they are not brought over as Traffick.

Cur': The Point in this Case will depend upon the Circumstances of it. It appears the Goods in Question were necessary Apparel, and imported for the Plaintiff's own private Use. Where Persons go to excess, and bring over any great Quantity of Goods, that will fall within another Consideration. It does not seem reasonable that Duty should be exacted for wearing Apparel that is necessary; and on the other Hand it seems as unreasonable, that People should be left at Liberty to import what Quantities they think proper under this Denomination: but that a Man should be obliged to pay Duty for every Trifle he brings over, does not seem to be reasonable. *Sed adjournatur*;

adjournatur; the Attorney General desiring Leave to speak to it; and *Michaelmas* Term, 6 *G.* 2. Judgment was this Term given for the Plaintiff.

Raymond Ch. J. The Goods in this Case are found not to be imported by way of Merchandize, but for the Plaintiff's own private Use; and it is not the Intent of the Act of Parliament such Goods should pay Duty; and so Judgment for the Plaintiff *per tot' Cur'*. See 2 *Stra.* 943. *Same Case.*

(233.)

Nichols *and* Swordfeager.

Assumpsit on a promissory Note.

ASSUMPSIT upon a promissory Note. Defendant pleaded *Non assumpsit infra sex Annos ante exhibition' Billæ prædict'*. Plaintiff replies, that he took out a Bill of *Middlesex*, *Trin.* 6 *G.* 1. which he continued down to *Mich.* 5 *G.* 2. and then avers *quod Causa actionis accrevit infra sex Annos ante prosecutionem, &c.* Defendant rejoins, that he claimed *Oyer* of the Bill of *Middlesex*, which was indorsed with certain Figures upon the Back of it, in Pursuance of an Act of Parliament *tent' apud Westm'* 9 *W.* 3. So goes on and sets out the Substance of the said Act; and the Indorsement bore *Teste* on such a Day; and then concludes *quod Causa actionis non accrevit, &c.* To this the Plaintiff demurred, and shewed for Cause, that the Act of Parliament in the Defendant's Rejoinder was not well set forth, for that it does not appear, whether the 9 *W.* was the original Sessions, or whether it

was

was held by Adjournment only; and cited *Cro. Jac.* 111. *Ford* and *Hunter:* Action of Debt was brought upon *Stat.* 8 *Eliz.* for Costs in Ejectment, and set forth *ad Parliamentum tentum apud, &c. anno octavo Eliz.* whereas the Parliament began *Anno Quinto*, and by Prorogation was held in *octavo Eliz.* And for this Cause after Demurrer, it was ruled to be ill. So likewise it is held in *Cro. Jac.* 139. *Sir William Read* and *Potter*, and *Cro. Car.* 232. *The King* and *Barnes*, and *Hill* and *Windsore.*

Mr. *Hager cont':* He insisted that the Defendant's Plea was a good Bar, for that the Bill of *Middlesex* bore *Teste* from the time of the Indorsement, and that 6 Years was lapsed from the Time the Note bore Date *ante exhibition' Billæ.* But the Court was clearly of Opinion that a Bill of *Middlesex* bears no *Teste*, and that the Indorsement on the Back was only to save the Penalty in the Act of Parliament. They held likewise the Act itself was ill pleaded; and agreed the Cases in *Cro.* to be Law. But the chief Objection with the Court was, if all this Stuff in the Rejoinder relating to the Act of Parliament was not Surplusage and immaterial: For if what is set out concerning the Act be left out and rejected, there is then a good Tender of an Issue, for then the Case will stand simply thus: The Defendant pleads *quod actio non accrevit*; the Plaintiff replies a Bill of *Middlesex* was sued out at such a Time, and that Continuances have since been regularly entred; and then avers *quod actio accrevit*; and

and to this the Defendant rejoins *quod actio non accrevit, &c.* which is a good Issue.

Mr. *Reeves:* If the Replication is good, our Rejoinder must in Consequence be so, for we have followed it Word for Word: Surplusage will never vitiate the Pleading when there is enough besides set forth to deny the Action, notwithstanding the Surplusage be shewn for Cause upon Demurrer. The Court was of Opinion, that the Introduction to the Replication was Surplusage and immaterial, and that it might be rejected. (234.)

Higden *and* Foster. *In Cam' Scat'.*

TRESPASS for taking and carrying away the Goods of the Plaintiff. The Defendant justified that he was a Custom-house Officer, and seized them as forfeited Goods, and carried them to the King's Warehouse as such. Upon the Trial the Case appears to be this: The Plaintiff was an *East-India* Merchant, and imported Goods from *Holland*, which upon search were found to be *East-India* Goods: But it appeared upon Evidence that these Goods were first imported upon the Company's Account, who sold them to the Plaintiff, who carried them into *Holland*, and three Years afterwards imported them into *England*. *Trespass.*

Reynolds C. B. held that they were not forfeited by *Stat. Car.* 2. intitled, *The Navigation Act*; and so Verdict was found for the Plaintiff with Damages.

The

The King *v.* Walker. Hil. 6 G. 2.

Scire Facias.

TO quash a *Scire Facias* which was brought to estreat the Defendant's Recognizance for not going to Trial. The Defendant was indicted in *Com' Ebor'* for not repairing the Highway. The Indictment was removed by *Certiorari*, and thereupon one *John Harrison* and *Robert Burnet* became bound by Recognizance in the Sum of 20 *l.* that the Defendant should go to Trial *eodem Termino, vel ad prox' Sessionem de Nisi Prius post dictum Terminum*, which is always the Form of a Recognizance upon a *Certiorari* to remove Indictments in *London* or *Middlesex*, but never in an Out-County; for where a *Certiorari* is to remove an Indictment in an Out-County, the Condition is always to go to Trial *ad tunc prox' Assisas pro Com' præd' tenend'*: In this Case the Prosecutors have blended the Substance of these two Recognizances together; for in the *Scire Facias* they have set out the Breach of the Condition in this Manner, *Quod Susanna Walker non comparebat in Cur' nostra coram nobis apud Westm' primo die tunc prox' Termini, nec placitavit ad Indictam' prædict', nec causavit aliquem exitum eodem Termino vel ad prox' Session' de Nisi Prius, vel ad tunc prox' Assisas post dictum Terminum*; which last Clause is no Part of the Condition, and therefore as the *Scire Facias* now stands, it is impossible the Defendant should know what Answer to make. Here is the Form of two different Recognizances

(235.)

Recognizances included in this *Scire Facias*, and therefore it must be taken there are two different Indictments depending, the one in *London* or *Middlesex*, and the other in an Out-County. Supposing therefore the Defendant had gone to Trial upon the Indictment in the Out-County, and not upon that in *London* or *Middlesex*; or if the Defendant had gone to Trial upon the Indictment in *London* or *Middlesex*, and not upon that in the Out-County, and afterwards a *Scire Facias* should have been brought for not going to Trial in the Out-County, it would be no Excuse to save the Defendant's Recognizance, to say that he went to Trial in the Out-County upon the Indictment in *London* or *Middlesex:* Therefore as this *Scire Facias* now stands, it is so general and uncertain, that it is impossible for the Defendant to know what Answer to make; and this is so material a Variance from the Recognizance, that the Court will quash the *Scire Facias*.

Cur': The Substance of the Recognizance is to appear and plead. It does not appear in this Case that the Defendant has done either. The Condition is rightly set out, only they have carried it too far, and have set out something more than is contained in the Condition. If the Defendant did not appear and plead, his Recognizance is forfeited; and so denied the Motion. *Absente Raymond* C. J. Note; Defendant in this Case ought to plead, *Quod comparuit & placitavit secundum Conditionem*, and demur to the Rest.

Gratwick

Gratwick *and* Sir John Shelley.

Presentment.

THE Defendant was presented for erecting a Mill and Dam, *&c.* which obstructed Navigation, and turned the Course of the River. All Proceedings being removed by *Certiorari* into this Court, an Issue at Law was directed to establish the Right, *&c.* And upon the Trial there was a great Contradiction in the Evidence, and *totidem verbis* directly opposite to each other; but upon the Whole, the Jury (which upon this Occasion was a special one) gave a Verdict for the Defendant. Upon a Motion for a new Trial, there were several Objections taken, and particularly, that the Jury before they brought in their Verdict had eat and drank at the Defendant's Expence. This was expressly contradicted by Affidavits; for altho' it was acknowledged that the Jury did take some Refreshment before Verdict, yet it was not at Sir *John Shelley*'s Expence, but each Man contributed his Share. It was agreed, that if this had been at the Expence of the Defendant, it had been material; but where the (236.) Jurors themselves are at the Charge, tho' it be a Misdemeanor for which the Jury is fineable, yet that shall not turn to the Prejudice of the Party in whose Favour the Verdict is. 2 *Salk.* 645. *Vide* also *Doct. & Stud.* It was also proved that a Drawer had Access to the Jury, and carried them Cool Tankards; and tho' it was insisted upon that the Jury ought

ought to be locked up, and no Person admitted to them before they had agreed to the Verdict, because by this Means they might have fresh Evidence given them, yet the Court refused to grant a new Trial. *Vide* 2 *Roll. Abr.* 454.

Guibert *and* Jones.

Fieri Facias.

FIERI Facias by the Plaintiff, Executrix of *Philip Guibert*, against *Catherine Jones*, Executrix of the Earl of *Ranelagh*, upon a Judgment for 900 *l.* recovered against the said Earl. The Sheriff returned *Nulla Bona*. The Plaintiff suggesting a *Devastavit*, issues a *Scire Facias inqui'*, to which the Defendant appeared, and the Sheriff returns a *Devastavit*, and thereupon the Defendant demurs.

Mr. *Fibner* took three Objections; 1*st*, That there was no *Scire Facias* taken out to make the Defendant Party to the Judgment. 2*dly*, There is no Judgment to ground this *Scire Facias* upon: For in setting out the Judgment, it is only said *Consideratum est*, as is usual where Judgment is originally entred; but in pleading the Judgment is always said *Consideratum fuit*; and so is *Carthew* 403. 3*dly*, It does not appear but the Inquiry was executed after the Writ was returned, for the Writ bears *Teste Quinden' Martin'*, which was 26th *November*, returnable *Die Jovis prox' post*, which was the last Day of the Term, and so in all Probability might be executed after the Return.

Mr.

Mr. *Fazakerly cont'*: Here is sufficient set forth to intitle the Plaintiff to her Action: In all Cases where the Action is founded upon a Judgment, the Proceedings are never set out at large; but if the Judgment is set out, every Thing antecedent thereto is omitted. As to the 2nd Objection, he said, *Consideratum est* was good, for it is not the present Tense, but the præterperfect, and is better *Latin* than *Consideratum fuit*. As to the last Objection, it appears that the Writ was executed the same Day on which it was returnable, which is good, for the Plaintiff has the whole Day to execute it in, and the Sheriff is not to return at what Time of the Day it was executed. It is as probable it was executed rightly as otherwise, and the Court will take it in the most favourable Sense.

Page J. Execution on the same Day on which the Writ was returnable is good; the Law makes no Fraction of Days, and it is said to be taken *Virtute Brevis*.

(237.) *Probyn* J. In Law *Consideratum est*, is always taken for the present Tense, and this is always the Method of entring Judgments; there is no Case where a Judgment pleaded by a *Consideratum est* has been held good.

Lee J. If it can relate to a Time past, the Court ought to support it. Judgment was given for the Plaintiff, *nisi*.

The

The City of London *v.* Sir Fisher

Tench. Pasch. 6 Geo. 2.

Action of Covenant.

ACTION of Covenant against the Defendant. In the Declaration the Plaintiff set forth the *Stat.* 5 & 6 *W.* & *M.* *c.* 10. intituled, An Act for the Relief of the Orphans and other Creditors of the City of *London*, and also the Indentures whereby the Defendant and Sir *Samuel Garret* deceased, in Consideration of a Lease granted to them by the City, *&c.* had jointly covenanted for themselves, their Executors, Administrators and Assigns, to pay yearly the Sum of 400 *l.* at the Feast, *&c.* And there being two Years in Arrear, this Action was now brought against the Defendant, being the surviving Lessee. Defendant craved *Oyer* of the Indentures, and then demurred generally to the Declaration; and Mr. *Bootle*, *jun.* took several Objections to the Declaration; 1*st*, That there was not a sufficient Assignment of any Breach, for where a Man covenants for himself, his Executors and Assignees, it is not sufficient to alledge Non-performance in the Covenantor only, but it must go further, and shew that neither the Covenantor, his Executors and Assigns, had performed, *&c.* 1 *Salk.* 139. 5 *Mod.* 133. *Cro. Eliz.* 348. *Colt* and *How.* *Sed vide Cro. Eliz.* 255. *Emott* and *Cole.* It shall not be intended there was an Assignee unless specially shewn. 2d Objection; It is alledged that 800 *l.* became due such a Day, which said

said Sum of 800 *l.* ought then to have been paid, whereas the Money reserved was only 400 *l. per Ann.* and consequently no more than 400 *l.* could become due on that Day. 3d Objection; The Plaintiffs have declared *pro Redditione prædict'*, and this is a Thing out of which a Rent cannot Issue; as in *Plow. Com.* 131. *Browning's Case.* 4th Objection; Variance in the Title of the Act set out in the Indentures in the Declaration, and the Indentures set forth in the *Oyer*, for in the one it is intitled, An Act for Relief, *&c.* and in the other, for the Relief, *&c.* *Sed adjournat'*; and *Mr. Bootle, jun. Mich.* 7 *G.* 2. moved this again, and relied only upon two Objections, *viz.* That there was a Variance between the Lease mentioned in the Declaration and the Lease set out in the *Oyer*; the Lease mentioned in Declaration being for 21 Years, and that in the *Oyer* for one and 21 Years, which is a Lease for a longer Time than is impowered by the Act of Parliament. The 2d Objection was, that the Breach was insufficiently assigned, because not averred that the Money was not paid by Sir *Fisher Tench* or his Assigns; and cited the Case of *Smith* and *Sharp*, 1 *Salk.* 139. where Difference is taken between doing a Thing to a Man or his Assigns, and doing a Thing by a Man or his Assigns: For if a Thing be to be done by a Man or his Assigns, the Breach must be in the Disjunctive, that it was not done by him or his Assigns; but where a Thing is to be done to a Man or his Assigns, it is sufficient to assign for Breach, it was not done to him; and if he did assign over

(238.)

over his Intereſt, that ought to be ſhewn on the other Side. And *Vide Cro. Eliz.* 348. the Breach aſſigned ought to be in Diſjunctive, and not in Conjunctive.

Garret Common Serjeant *cont'*: The Variance in this Caſe is not material, in Declaration the Act of Parliament is ſet forth, which gives Power to make Leaſes for 21 Years; and this is a Leaſe for 21 Years only, ſo that the Power is well purſued. As to the 2d Objection, he ſaid, the Action was brought againſt Covenantee, and no Reaſon to ſuppoſe an Aſſignment; but the Declaration goes farther, and amounts to an Averment that the Leaſe is ſtill in Sir *Fiſher Tench*, for the Words are here *uſque habuit, &c.* which could not be, had there been an Aſſignment over.

Yorke Ch. J. There are two Objections made to the Declaration, one a Variance between Leaſe ſet out in Declaration and in the *Oyer*; but the Variance is not material, it is only in Recital of an Act of Parliament ſet out in the *Oyer*, where it recites the Act as giving a Power to make Leaſe for one and twenty-one Years. But ſuppoſing the Power granted by the Act had been as ſet out in the *Oyer*, and City makes a Leaſe for 21 Years only, that is certainly good, and within the Power given by the Act. The 2d Objection is the Aſſignment of the Breach. This cannot properly be called a Rent, becauſe iſſuing out of an incorporeal Inheritance; it muſt therefore be taken for a Sum in Groſs. The Covenant is, that Sir *Samuel Garret* and Sir *Fiſher Tench*, their Executors, Adminiſtrators and Aſſigns,

 ſhall

shall yearly pay, *&c.* and the Breach assigned is, that Sir *Fisher* has not paid. Now the Objection is, that it is not sufficient to aver Non-payment in Sir *Fisher* only, without adding the Words (*nor his Assigns*); and to support this *Salkeld* is cited. This Distinction is pretty nice, and very extraordinary for a Court to presume an Assignment; but here is in this Declaration what amounts to an Averment, that there was no Assignment; for it is said that Sir *Fisher hic usque habuit*, and therefore declaring against him only is sufficient.

Judgment for Plaintiffs.

(239.)

Mackarley *v.* Barrow.

Motion to discharge a Bankrupt. 2 *Stra.* 949. 2 *Barnard. K. B.* 251, 255. *S. C. S. P.*

A Motion to discharge the Defendant a Bankrupt out of Custody, being taken in Execution for a Debt due to the Plaintiff before the Defendant became a Bankrupt; and the Motion was grounded upon 6 *G.* 1. *c.* 22. which impowered any one or more of the Judges of the Court wherein Judgment has been obtained against a Bankrupt for any Debt owing before he became a Bankrupt, upon producing his Certificate allowed and confirmed as the 5 *G.* 1. *c.* 24, requires, to discharge him out of Custody. And upon a Rule to shew Cause,

Mr. *Strange* objected, That the Defendant ought not to be discharged for two Reasons; First, because the Facts in the present Case are not within any one Act of Parliament made in Relief of Bankrupts. *2dly*, That the clause in

in 6 *G.* 1. does not extend to the Case in Question. He argued, that it did not appear when the Defendant became a Bankrupt, but taking it that he became one from the Time of the Commission only, yet he could not be discharged; this being a Debt which accrued subsequent to the Commission, consequently could not be discharged by it. This is an Action brought by the Plaintiff upon several Bills of Exchange drawn by Defendant 13 *January* 1728. they were foreign Bills, and the Plaintiff sent them abroad, but the Drawee refused to accept them, and so returned protested, but before they were returned the Defendant became a Bankrupt; at which Time the Plaintiff was not intitled to his Action; for where Bills are drawn payable at a future Day, there must be a Tender of the Bill, a Refusal by a Drawee, and a Protest for Non-acceptance, before the Drawer becomes liable, and therefore at the Time of the Commission this was not such a Debt as intitled the Plaintiff to that Recompence which the Statute gives Creditors upon these Occasions, *viz.* to his distributive Share of the Bankrupt's Effects, therefore in Point of Law is not to be considered as a Debt subsisting at the Time of the Bankruptcy. The Defendant should make it appear when he became a Bankrupt, for it may be, the Bills were drawn subsequent to the Bankruptcy; for the Commission always relates to the first Act of Bankruptcy, which can never afterwards be purged: The Words of the Statute are, For any Debt owing at the Time he becomes a Bankrupt. 2*dly*, He

said, That the Defendant was not intitled to his Discharge by any Act of Parliament. As to 5 *G.* 1. that was only a temporary Act, and is now expired; and 6 *G.* 1. cannot relate to a Thing not in Being; so concluded that Defendant was not intitled to his Discharge, nor to Relief under any Act of Parliament.

(240.) Mr. *Foulks* in Answer said, That as to the first Objection, this was a Debt subsisting at the Time of the Commission, and the Plaintiff was intitled to a ratable Part of the Bankrupt's Estate by 7 *G.* 1. *c.* 31. being therein expresly enacted, That Creditors, whose Debts are not become payable, are intitled to a distributive Share of the Bankrupt's Effects; for the Defendant became a Bankrupt from the Time of drawing the Bills, which were *Debitum in præsenti, solvendum in futuro:* And as the Statute impowers the Judges in these Cases to proceed in a summary Way, he prayed that the Defendant might be discharged.

By the Court: The Act of Parliament is clear in this Case: the Words are, Persons that have taken Securities for Money, payable at the End of 3, 4, or 6 Months, or other future Days of Payment; or who shall become a Bankrupt, and such Money shall not become due or payable at the Time he becomes a Bankrupt, shall be admitted however to prove their Bills, Bonds, Notes or other Securities, as if they were made payable presently and not at a future Day, and be intitled to a Part of the Bankrupt's Estate. The Judges by the 6 *G.* have Power to proceed in the summary Way; and the Relation to the 5 *G.* is only

only with respect to the Allowance of the Certificate. Defendant discharged *per Cur'*.

St. Martin's Ludgate *v.* Martin's Westminster.

Settlement.

A Prisoner in Execution in the *Fleet*, rented a Tenement within the Liberties of the Prison at 25 *l. per Ann.* where he lived two Years and upwards, paid all Parish Taxes, and executed several Parish Offices, but died poor and insolvent, leaving a Daughter about seven Years old. By Order of two Justices it was adjudged that the Daughter should be maintained by the Parish of *St. Martin's Ludgate*, for that the Father by renting a Tenement of 25 *l. per Ann. &c.* had gained a Settlement in that Parish. Upon Appeal to Sessions this Order was reversed, and the Child sent to *St. Martin's Westminster*. Both these Orders were removed by *Certiorari* into *B. R.* The Question was, whether the Father being in Execution, and renting a Tenement within the Liberties of the Prison, *&c.* had gained a Settlement according to Act of Parliament. It was objected, that the Act of Parliament did not extend to Prisoners in Execution, for supposing he had rented a Tenement under 10 *l. per Ann.* the Parish could not have removed him. The 14 *Eliz. c.* 5. and 19 *Car.* 2. *c.* 4. make Provision for poor Prisoners; and as they are expresly relieved by particular Acts of Parliament, they cannot be supposed to be included within the Acts

(241.) Acts of Settlement, and unless they are within the Intention of those Acts, the Court will not construe them to be within the Letter of them.

Cur': We must judge upon the Case as it stands upon the Order. It is returned that the Father rented a Tenement of 25 *l. per Ann.* this by express Words of the Act gains him a Settlement. There are no Exceptions in this Act, the Words are general, and we cannot construe this Case out of the Meaning of them: Because the Father is in Prison, it does not follow that he is a poor Prisoner. The Parish of *St. Martin's Ludgate* have made themselves liable, (admitting him to be originally out of the Act) for they have acknowledged him to be one of their Parishioners by throwing the Parish Duties upon him. We cannot now inquire into his Circumstances; be he poor or not, is now nothing to the Purpose. The Act is indefinite, *viz.* To all Persons renting a Tenement at the yearly Rent of 10 *l.* or upwards; here the Father rented 25 *l. per Ann.* lived 2 Years within the Parish, doing all Parish Duties, and so in all Respects he hath gained a Settlement within the Act. Therefore quashed the Order of Sessions, and affirmed the original Order.

Inter

Inter the Parishes of Northpelterton *and* Horsington.

Order of Justices.

AN Order was made by two Justices to remove *John Foen*, his Wife and Children, from the Parish of *Horsington* to the Parish of *Northpelterton*, which they adjudged to be the last legal Place of Settlement of *John Foen*. The Parish of *N.* did not appeal from this Order, which was confirmed at the next Quarter-Sessions; but afterwards upon Application to two neighbouring Justices, an Oath being made that *John Foen* at the Time of his pretended Marriage was married to another Woman who was then alive, and lived several Years after the Solemnization of his second Marriage with *Mary Hillier*, (who was the Person removed under the Denomination of *John Foen*'s Wife by first Order). These Justices made an Order to remove *Mary Hillier* and the Children who were Bastards back again to the Parish of *H.* being the last legal Settlement of *M. H.* and the Birth of the Children. The Parish of *Horsington* appealed to the General Quarter-Sessions, who repealed the second Order, and alledged for a Reason upon the Face of their Order, that the first Order being unappealed from and confirmed at the next Quarter-Sessions, stood in full Force, and was conclusive to all Parties; and averred *Mary Hillier* to be the same Person that was removed by the first Order under the Denomination of *Foen*'s

(242.) *Foen*'s Wife. All these Orders being removed by *Certiorari* into *B. R.* it was moved to quash this last Order of Sessions; and the chief Objection was, That the Persons removed by the two several Orders of the Justices of Peace were different Persons, and not the same Parties. By the first Order *John Foen*, his Wife, *&c.* were removed from the Parish of *H.* to the Parish of *N.* and by the second Order *Mary Hillier* was removed from *N.* to *H.* so that the Persons removed appear to be different Parties, and therefore are not included within the general Rule, *viz.* that an Order unappealed from and confirmed is conclusive to all Parties; but this Rule for any Thing that appears by the second Order stands unimpeached, *Causa qua supra*. By the second Order it appears that *H.* was the last legal Settlement of *Mary Hillier*, and the Children which were born there are Bastards, and consequently their Settlement must be there likewise; therefore the second Order ought to be confirmed, and the Order of Sessions must be quashed. To this it was answered and resolved, that the first Order was still standing in full Force, and therefore the Justices had no Authority to quash it, and remove the Parties back again. That if the Children were Bastards, and *Mary* was not the Wife of *J. F.* this would have been proper Evidence upon an Appeal from the first Order, but that there being no Appeal, and it being confirmed, was now conclusive, and must bind all Parties; and it is averred that *Mary Hillier* was the Person removed by the

the first Order under the Denomination of the Wife of *J. F.* and for the Reasons aforesaid the Order of Sessions was confirmed. *Vide* 2 *Salk.* 492. *inter the Parishes of Swanscomb* and *Shensfield*, *Term Trin.* 5 & 6 *G.* 2.

Osting *v.* Jarvise.

Parish Clerk.

SUIT in the Spiritual Court to swear in a Parish Clerk, upon this Case. The Defendant was elected by a Majority, but upon Pretence that he had waived the Election, the Parishioners proceeded to a new Election, and then chose in the Plaintiff. Upon this Defendant entred his Caveat in the Spiritual Court, and the Plaintiff in order to discharge this Caveat commenced his Suit, as is always the Practice of that Court, who upon the Circumstances of the Case gave Judgment against the Plaintiff with Costs, and decreed that *Jarvise* should be sworn in Clerk; whereupon *Osting* now came and prayed a Prohibition, suggesting that the Spiritual Court had no Jurisdiction. It was objected, that this Suit was commenced by the Plaintiff, and prosecuted by him until Judgment; it is now therefore something extraordinary that he should object to their Jurisdiction.

(243.)

Mr. *Strange* for the Prohibition: The Right of Election in this Case is created by an Act of Parliament, and we have suggested that *Osting* was duly elected. The Office of Parish Clerk creates a Freehold, and notwithstanding the Exercise of the Office is concerning

cerning Spiritual Matters, yet the Office itself is Temporal, and for that Reason a Prohibition shall go. 2 *Roll. Abr.* 285. It is a common Case for the Plaintiff below to come here himself and move for Prohibitions; the Precedents to this Point are numerous; and so was the Case of Dr. *Wilmot*, lately adjudged in this Court. But the Defendant offering to try the Right of Election upon a feigned Issue, the Court adjourned it to see if the Plaintiff would consent.

Term Pasch. 6 G. 2. B. R. 1733.
Page, Probyn, Lee, *Lord* Raymond C. J. *dying in* Hil. *Vacation.*

The King *and* the Corporation of the Borough of Evesham.

Mandamus.

A *Mandamus* was granted to the Corporation of *Evesham* to proceed to the Election of a Burgess in the Room of one *Stone* deceased; and Mr. *Wills* and *Fazakerly* moved to quash this *Mandamus*. This is a Corporation created by Letters Patents, and the Corporation must proceed to Election within 24 Hours after Notice given, which is so short a Time that it is almost impossible for the absent Members, whose Duty occasions their Attendance in other Places, to be present at the Election. It is therefore Reasonable that the Notice should be enlarged, and the *Mandamus* qualified with this Restriction, or otherwise not to grant the *Mandamus* at all.

The

The Party cannot proceed to Election without a *Mandamus*, therefore when they come to ask a Favour of the Court, the Court will put such Terms upon the Party, and so far restrain the general Words of the *Mandamus*, that neither Party can receive any Prejudice thereby. What is now prayed of the Court is a Thing in itself so just and reasonable, that it is hoped we are proper in our Motion. If a farther Day be appointed no Inconvenience can arise. It is only giving all Members Opportunity to discharge their Duty to the Corporation by giving Attendance: On the the other Hand, if the *Mandamus* is granted generally, it may be of the utmost Consequence, and is in Effect to deprive the absent Members of their Right in voting at all at Elections in the Corporation; for unless further Notice be given, it is impossible they should attend, especially as this Case stands; for Sir *John Rushworth* being a Member of Parliament, is obliged to give his Attendance in the House, to which all inferior Jurisdictions ought to submit.

The Motion was denied *per Cur'*: For (244.)
Mandamus's in these Cases are only Motions of Course, and are *ex debito Justitiæ*. By the express Words of the Charter the Members are only to have 24 Hours Notice, and it is the Duty of the Corporation to hold Court according to the Charter. The *Mandamus* is only to compel them to do their Duty; and there is no Precedent where the Court has put any Restraint upon the *Mandamus*. It seems reasonable, and a Matter of Justice, that

that longer Notice ſhould be given; but the Charter is expreſs, and this Court have not an arbitrary Power in them to alter it. To appoint a longer Time would be in a Manner prohibiting the Corporation from acting according to their Charter. The *Mandamus* is a Writ of Right, and when the Party has ſufficient Matter before the Court, he is intitled to it *ex debito Juſtitiæ*. As this Court has not a diſcretionary Power in granting *Mandamus's*, ſo neither can it fetter or delay them: And this is not like the Caſe of Attachments, which are merely in the Breaſt of the Court, and iſſue only for Contempts or Abuſes of the Proceſs of the Court; and that is the Reaſon that the Court, which is the propereſt Judge of its own Proceſs, may put what Terms they may think proper upon them. In the ſame Caſe, a *Mandamus* was directed to the Mayor and Corporation of *Eveſham*, and a Rule to return the Writ; and now an Attachment was moved for againſt the Mayor, *&c.* for not making a Return. It was objected, that it did not appear that the *Mandamus* was ſerved; but an Affidavit of Service being produced, it was then objected that the Affidavit ought not to be read, becauſe not filed. To this it was anſwered, That *Mandamus's* are upon the ſame Footing with all other Writs iſſuing out of the Court, and that when a *Latitat* or other Writ is directed to the Sheriff, it is the conſtant Practice of this Court to grant a Rule, *&c.* without an Affidavit being made of the Service of the Writ; and if afterwards the Service comes

comes to be controverted upon the Attachment, then is the proper Time to make Affidavit of it.

A Rule for the Return is always granted of Course. And for this Reason *Probyn* and *Lee* were of opinion that the Affidavit ought to be read, but *Page* was of a different Opinion.

The King *and* Pinkney.

Indictment for a Cheat.

THE Defendant was indicted for a Cheat; and the Indictment set forth that the Defendant sold Corn to the Prosecutor, which he falsly averred to be a full Bushel, whereas there was not a Bushel, *sed plurimum deficiebat*. This Indictment being removed by *Certiorari*, three Objections were taken: The first Objection was, that this was not a publick Cheat, but a Breach only of a private Contract, and therefore was not indictable. The second Objection, that admitting this to be a Cheat, it was not an Offence at Common Law, but punishable only by *Stat.* 22 *Car.* 2. *c.* 12. 8. and the Indictment doth not conclude *cont' formam, &c.* Third Objection, The Indictment is too general and uncertain; for it is only said *plurimum deficiebat*, but it does not appear how much; and another general Objection was made, that it being an Indictment for a Cheat, it was not proper to quash it upon Motion; and in Support of these Objections there was cited *Mod. Cases* 42 [i.e. 6 Mod.]. *Sid.* 409. *Salk.* 379. *Queen* and *Jones*,

(245.)

Jones, 5 *Mod.* 18. *Mod.* 71, 288. *Hil.* 2 *G.* 1. *The King* and *Channing*. Indictment against a Miller for a Cheat; and sets forth that so much Corn was delivered him to grind, *& quod cepit & detinuit* so many Bushels; and upon Motion, the Indictment was quashed. So the Case of *The King* and *Mar' Obryan*, *Pasch.* 3 *G.* 2. and the Case of *The King* and *Nicholson*, 4 *G.* 2. at the Sittings. Indictment for a Cheat; and set forth, that the Defendant contracted to deliver so many Chaldron of Coals, that each Chaldron ought to contain 36 Bushels, and that when the Defendant delivered them each Chaldron contained less, *&c.*

And it was held by *Raymond* C. J. That this was only a private Contract, and not indictable. In support of 3d Objection was cited 2 *Roll. Abr.* 80. *p.* 13. *Cro. Jac.* 324. *Cro. Car.* 380. 2 *Salk.* 687. And upon these Objections the Indictment was quashed. *Vide Carth.* 277. Indictment against a Pawnbroker, *Quod illicite & deceptive* refus'd to deliver, *&c.*

The King *and* Corporation of Walsol.

Motion for a Quo Warranto.

UPON Motion for a *Quo Warranto*, this appeared to be the Case: The Corporation of *Walsol* was incorporated by Letters Patents, with Power to hold Courts, *&c.* but no Provision was made by the Charter, what Notice was necessary to be given previous to the holding every Court. But it had been usual

usual for the Mayor, on the Fair Day, to give Notice at the Town Hall, where the Members were obliged by a certain By-Law to meet: And accordingly the Mayor had given Notice at one of these Meetings, that a Court would be held the same Afternoon, in order to proceed to the Election of Burgesses; but all the Magistrates were not present when this Notice was given. A Court was accordingly held in the Afternoon, and Burgesses elected. And now an Information in the Nature of a *Quo Warranto* being moved for to shew by what Authority the new elected Members acted as Burgesses;

The Court held, that altho' there is no Notice required by the Charter, yet Notice must be given; and notwithstanding it was said to be the usual Method of giving Notice, as in the present Case, yet the Court did not think this Notice sufficient in Law, and therefore an Information was granted. (246.)

The King *and* Justices of the Corporation of Shrewsbury.

Motion against five Justices.

UPON Motion for an Information against five Justices of the Peace, the Case was this; The Overseers and Churchwardens of the Parish, *&c.* made a poor Rate, and at the Instance of the Churchwardens four Persons were rated who never before contributed to any Rate, and therefore appealed to the Justices of the next Quarter Sessions, who finding a Rate to be wrong, sent it back again: But the

the Churchwardens refusing to make any Alteration, the Rate was again brought before them the same Sessions held by Adjournment; and the Justices quashed the Poor Rate, and made a new Rate, wherein the four Appellants and ten others were omitted; and this was complained of as an arbitrary Proceeding in the Justices; for tho' they might strike out the four Persons appealing, yet they could not strike out the ten who had not appealed, nor complained of any Injury; and the Reason of leaving them out, was to deprive them of their Franchises in voting for Members of Parliament; for the Constitution of this Corporation is such, that all who pay Scot and Lot have Votes, and not otherwise; and therefore to strike them out of the Rate is a great Oppression, and deprives them of the Benefit of their Franchise as Freemen. The *Stat.* 43 *Eliz.* gives the Justices power to relieve Persons aggrieved, and to make such Order therein as to them shall seem meet; and the Word (*therein*) is purely relative, and shews how far their Power is to extend, *viz.* to give Relief to Persons aggrieved, who bring their Cause before them upon Complaint: And they have not by this Act of Parliament a Power to strike out and put in as they think proper.

The Court denied the Motion, and held that the Sessions may make such a Rate as is most proper and necessary; for where the Rate which is brought before them upon Appeal is unequal, the Poor are not to starve until the Overseers have made a new Rate; but

but the Juſtices may do it themſelves *ex Officio*, by Virtue of the Statute; and the Caſe in *Salk.* and *Carthew* is good Law. And the Reaſon of that Caſe is not founded upon the particular Circumſtances of our Caſe only, but upon the general Words of the Act of Parliament. *Vide Carth.* 58. *The King* and *Martin.* Seſſions confirmed a Poor Rate, but did not ſet forth that it came to them by Appeal; and for this Reaſon the Order was quaſhed, becauſe by the Statute the original Juriſdiction is given to the two next Juſtices, and the Seſſions have no Power but upon Appeal of the Parties grieved. S. C. 2 *Stra.* 975. (247.)

The King *and* Overſeers and Churchwardens of Brackley Pariſh St. Peter's Com' Southampton.

Order of Seſſions.

UPON Motion to quaſh an Order of Seſſions, the Caſe appeared to be this: The Churchwardens and Overſeers of the Poor for the Year 1730. upon making up their Accounts, charged ſeveral Sums of Money diſburſed in a Law Suit between their Pariſh and the Pariſh adjoining; and this Account was allowed and ſigned by two Juſtices according to the Statute: But upon Appeal to the Seſſions in 1732. theſe Diſburſements were ordered to be ſtruck out of the Account, and that the Churchwardens and Overſeers ſhould pay the ſame to the preſent Overſeers. This Order being removed by *Certiorari*, Mr.

Abney took several Exceptions; *1st*, This Order appears to be grounded upon an Appeal lodged at a preceding Quarter-Sessions; and it does not appear when that Sessions was held, nor what was there done upon the Appeal, and so it is a Discontinuance. Agreed, the Parties might appeal when they thought proper, for the Statute is general, and does not confine them to the next Quarter-Sessions; but when the Appeal is made, it must appear that the Sessions did something upon that Appeal; and this is a general standing Rule; for after an Appeal is once lodged, a subsequent Sessions cannot proceed upon it as upon an original Appeal.

Mr. *Fazakerly cont*: It is said to be at the last Quarter-Sessions, which is certain enough, for it is relative, and shews when that Sessions was held; and there is no Occasion to shew particularly what was done upon that Appeal, for Proceedings at the Sessions are not like Proceedings at this Court, when a Day is given to the Parties. For the Statute in this Case is general, and the Party grieved is at Liberty to appeal at what Time he thinks proper, and is not tied up to the next Quarter-Sessions; and is like the Case where Motion is made in Arrest of Judgment; the Defendant is not restrained to any particular Time, but may come at any Time before Execution, and in that Case there is no Day given. 2d Objection: It ought to be set forth specially when the Sessions was held, for the Statute confines them to particular Times, and it might be held at a Time not prescribed by the

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the Statute, and so all would be *coram non judice*; and so it was held in the Case of *The King* and *Saunders*. *Vide* this Objection answered *ut supra*. 3d Objection: This is an Order to compel the Churchwardens to account, *&c.* and it is not said that they are Overseers of the Poor: For as Churchwardens the Sessions have no Jurisdiction over them. Supposing Poor Rates, and Matters relating to Ecclesiastical Affairs, should have been jumbled together in the same Order, that Order should not surely be good; and it does not appear in this Case in what Capacity the Churchwardens are to act. Mr. *Fazakerly* agreed, that Disbursements of Churchwardens acting in a Spiritual Capacity, was not subject to the Jurisdiction of the Sessions; but here it appears they are acting in another Capacity, as Overseers of the Poor: For the Order is, that the Churchwardens and Overseers of the Poor shall account so and so. 4th Objection: It does not appear that this was a regular Sessions. Answer: But the Court won't presume it irregular, and nothing appears to the Court to induce them to judge it irregular, that is incumbent on them to shew. Every Thing shall be presumed to be right till the contrary appears; and in this Case the Court won't think it unnecessary to set forth the precise Time when the original Sessions was held, with Intent only to see if by this Means they can make the Order bad. 5th Objection: Sessions have not an original Jurisdiction; and it does not appear that any

Order was made in this Case before it came to the Sessions.

Answer: The Statute gives an Appeal to the Party grieved by an Act of the Churchwardens, Overseers, or Justices of the Peace, so that the Act of Parliament is pursued. It comes before the Sessions by Appeal, and there was no Occasion for the Justices to make an Order if they sign the Rate. It is sufficient, *Vide Carthew* 58. *The King* and *Martin*, That Sessions confirmed a Poor Rate, but did not set forth that it came to them by Appeal; and for this Reason it was quashed. 6th Objection, Said generally to account with the Overseers, and does not mention them Parishioners by Name. Answer: It is the best way to name them generally; it is said, to the present Churchwardens and Overseers, and that is sufficient. 7th Objection: The Sessions in this Case ought to have made a new Order, and not have ordered these several Sums to be struck out of the old Rate. Answer: The Statute which gives the Sessions a Jurisdiction in this Case, impowers them to proceed as they think fit. They are of Opinion that these Sums ought not to stand in the Rate, and therefore have ordered them to be struck out.

The Court did not give any Opinion, but took Time to consider.

Patten

Patten *v.* Smith. Mich. 6 G. 2. (249.)

Trespass.

ACTION of Trespass upon the Case for executing a Warrant directed to the Sheriff within the City and Liberty of *Westminster* to the Damage of the Plaintiff 100 *l.* The Plaintiff set forth in his Declaration a Grant from the Crown to the Dean and Chapter of *Westminster* to execute all Writs, Process, *&c.* in the same Manner as they used to be executed by the King and his Predecessors: He then goes on, and sets forth a Grant from the Dean and Chapter to himself for Life, with the same Power of executing all Writs, *&c. Virtute cujus inde possessionatus existit*; and then shews, that contrary to this Grant the Defendant had executed a Warrant *infra Libertatem prædict' ad damnum, &c.* To this the Defendant demurred; and assigned for Error, that the Plaintiff had set forth a Grant for Life, *Virtute cujus possessionat', &c.*

Serjeant *Hawkins* argued for Defendant, That the Plaintiff having set forth in his Declaration a Grant for Life, the *Virtute cujus possessionat'* was ill; for that *possessionat'* was capable only to a Term for Years, and that wherever a Freehold was alledged, it was pleadable only by the Word *Seisitus*, which is a Term of Art, and therefore cannot be supplied by any other Word; and for this he cited *Lill.* 1, 324. 1 *Inst.* 200. *b.* 201. *a.* Every Man's Deed must be taken most strongly against himself; and therefore when he sets forth a Grant for Life, and then goes on

on and says *Virtute cujus possessionat'*, it must be taken there was a Defect in the Grant, and that he was possest only of a Chattel. He likewise further objected, that the Declaration was too general, for it is not said what Process it was the Defendant had executed: It is only generally alledged that the Defendant executed a Warrant directed to the Sheriff; and perhaps it might be such a Writ as might be executed within this Liberty by a Sheriff's Officer; for Writs of Waste, Disseisin, *&c.* are not included within the Jurisdiction of the Dean and Chapter. All pleadings ought to be certain, and therefore this general way of declaring is not good. He further objected that the Declaration was ill; for that it set forth a Grant to execute all Writs *infra Civitatem Westmonaster'*; and then alledges that the Defendant had executed a Writ *infra Libertatem prædict'*, whereas the Word *Libertatem* was not used before in any Part of the Declaration; and cited 1 *Vent.* 402, 406. where it is said by *Hale* Chief Justice, that Liberties are pernicious to the common Justice of the Kingdom. It was likewise held in *C. B.* in the latter Part of Queen *Anne*'s Reign, *inter Wannisford* and *Ford*, which was upon a Plea in Abatement, where it was alledged that the Party lived *infra Libertatem*; and it was held that a Liberty was an uncertain Place, and not sufficient.

(250.) Mr. *Wynne cont'*: *Virtute cujus possessionat'* is sufficient, and is of the same Force and Effect in Parlance as the Word *Seisitus*, and may be used as well to express a Freehold as a Term

Term for Years. 1 *Inst.* 17, 153. And my Lord *Coke* says, a Disseiffin is a putting out of Possession. *Virtute cujus*, *&c.* is not traversable, and at the most is but an Impropriety: But supposing there was a Difference, yet as the Defendant is a Wrong-doer, it is not so material as to overturn the Declaration. This Action is of the same Nature as an Action of Trespass, and therefore good upon the Possession only, and that the Words sufficiently prove. *Carth.* 85. But it is farther objected, that it does not appear what Sort of Warrant it was that was executed: And it is impossible it should, for that remains with the Sheriff; and had the Plaintiff alledged no more than the Receipt and *Asportavit*, *Arrestavit*, it had been sufficient: For it is not material to shew what sort of Process he entred by; it is laid in the Declaration that the Dean and Chapter had a Grant to execute all the King's Writs, *&c.* and that this Liberty was granted to him for Life. As to the last Objection, which is taken to the Word *Libertatem*, *&c.* he is stiled *Ballivus Libertatis*, and it is well known that the City and Liberty of *Westminster* are synonymous Terms, and so they are promiscuously used in 17 *Eliz.* But as to these two last Objections, he said they were not assigned for error; they extend to Matter of Form only, and therefore by the express Word of the Statute, ought to have been specially assigned.

Page Justice: Possession only is sufficient to maintain this Action; it is brought for a Tort, and the Defendant is a Wrong-doer.

In

In Actions for stopping up Lights, it is always said *Quod cum possessionatus fuit*; and that is sufficient. The other two Objections extend to the Form only, and therefore should have been specially assigned. Judgment for the Plaintiff, *nisi*, *absente Raymond* C. J. Note, *Bracton* calls a Freehold in Law, *Civilem & Naturalem possessionem, seu Seisinam.* 1 *Inst.* 266. *b.* *Bracton*, *l.* 4. *fo.* 206, 236. Note also, that the Plaintiff in his Declaration did not set forth a Grant from the Crown to the Dean and Chapter, but alledged a Seisin in Fee in the Dean and Chapter. And afterwards in the same Term the Judgment was made absolute.

The King *and* Jenour.

Information for a Libel.

AN Information was moved for upon a Libel published by way of Advertisement in a publick Paper called the *Daily Advertiser*, and the Libel complained of was to this Effect, *viz.* That *James Haywood* sold Wines by Retail very cheap, and at reasonable Rates; and that Mr. *Haywood* hath an excellent Salve for the Cure of Womens Breasts, Price one Shilling.

(251.) Mr. *Reeves* and Mr. *Filmore* to oppose the Information: A Libel is an infamous Paper made Publick, aspersing the Credit of the Person libelled, or defaming the Character of one deceased in such Terms as may be prejudicial to the one in his Business, or so provocative as to tend to a Breach of the Peace, or

or else by reflecting upon the other so as to make his Character infamous. But supposing the Defendant to be the Publisher of what is here alledged against him, there is nothing libellous upon the Face of it. To say a Man sells Wine by Retail is no Reflection, or to say a Man hath an excellent Salve, can no ways traduce his Character: He may have such a Salve, and may Dispose of it charitably. The Court won't grant Informations of this Nature unless something scandalous and infamous appears upon the Face of it. In Actions of Assault and Battery the Court won't grant Informations, unless something flagrant and particular hath been done by the Party; as drawing of Swords, *&c.* So in Libels, for every trifling Reflection an Information won't go. If the Prosecutor has sustained any Injury, he may take his Remedy in the ordinary Course of Proceedings: He may have his Action for the particular Injury, or may bring an Indictment upon the libellous Matter. But it does not appear by the Affidavit that the Defendant was the Publisher; it is only said that his Son acknowledged the Receipt of the Advertisement, and read it to his Father; but not one Word of his publishing the Paper where his Advertisement is inserted.

Serjeant *Urling* and Mr. *Fazakerly cont':* The Matter is of itself libellous; the Plaintiff is a great Wine Merchant, and to say that he sells by Retail, by Quarts and Pints, is reflecting and lessening his Credit; to call a Shoemaker a Cobler is libellous. *Vent.*

Cur':

Cur': If the Party hath ſuſtained any Injury, he may have his Remedy either by Action or Indictment. Libels are not to be encouraged; but to ſay that a Merchant ſells Wine by Retail is no Reflection: The greateſt Merchants have done the ſame, and great Fortunes have been acquired that way; and ſo the Information was denied.

The King *and* Inhabitants of Wool-aſton.

Orders of Juſtices.

MR. *Wirley Birch* moved to quaſh several Orders of Juſtices of the Peace for Maintenance of the Poor: His firſt Objection was, that it did not appear to be under Hand and Seal, which is neceſſary, being a judicial Act. 2*dly*, It doth not appear to be made upon Oath. 3*dly*, It doth not appear to be made by Juſtices living within the Pariſh. 4*thly*. The Facts are not ſet out in the Order. Note, The Motion was to quaſh an Order of Seſſions made in Confirmation of these Orders. If the original Orders are bad, conſeqently the Order of Seſſions muſt be ſo. *Salk*. 482.

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Mr. *Parker* to ſhew Cauſe why the Order ſhould not be quaſhed, and in Anſwer to the firſt Objection, he ſaid, That though in the Concluſion of the Order it does not appear to be under the Hands and Seals of the Juſtices, yet in the Beginning it is ſet forth and begins thus, *viz*. We whoſe Hands and Seals are hereunto ſubſcribed; which is a plain Anſwer to

to the first Objection. As to the second, That it does not appear to have been made upon Oath, or that the Overseers were summoned as required by 9 *G.* 1. *c.* 7. there nothing appears to the contrary; and the Court will not intend them to proceed extra-judicially. *Vide Carth.* 366. A person was removed by Order of Justices, and Objection being taken to the Order, as it did not appear that he was removable, and perhaps he might have rented a Tenement of 10 *l. per Ann.* But the Objection was over-ruled, and said, that the Court would not intend it. As to the third Objection, that it is not said to be made by Justices within the Parish, nor is it averred that there were no Justices within the Parish, he answered, That it was not necessary to alledge any such Matter upon the Order; and that if there were Justices resident within the Parish, it was proper to be shewn on the other Side; and cited *Hob.* 78. *St. John* and *St. John.* Action upon the Stat. 23 *H.* 6. *c.* 10. for not returning a Burgess, where the Words of the Statute are, that the Sheriff shall send his Precept to the Mayor, and if there be no Mayor, then to the Bailiff. The Plaintiff declared that the Sheriff had made his Precept to the Bailiff, without averring that there was a Mayor; and this was moved in Arrest of Judgment; but the Court was clearly of Opinion that it was good, for we shall not intend that there is a Mayor, except it be shewn, and that should come properly on the other Side. So in the present Case, if this Order was made by Justices out of the Parish, and

and at the same Time there were Justices resident within the Parish, this would have been a proper Objection upon the Appeal, and the Party should have shewn this Matter at the Sessions. As to the Objection, that the Overseers were not summoned, it is not necessary: This should appear upon the Orders; and cited the Case of *The King* and *Venables*, *Trin.* 11 *G.* 1. Indictment to suppress an Alehouse; and it was objected, that it did not appear the Defendant was summoned; but held that the Court would not intend the contrary: So was the Case of *The King* and *Holland*, which was an Order of Bastardy, 5 *G.* 2. But note, in the Case of *The King* and *Clegg*, 7 *G.* 1. *Vide* 8. *Mod. Rep.* 3, Order of Bastardy was quashed, because not set forth that the Party was duly summoned.

(253.) Mr. *Fazakerly* and Mr. *Werley Birch cont':* The Objection that this Order does not appear to have been made upon Oath, is very strong; for the express Words of the Act of Parliament, 9 *G.* 1. *c.* 7. are, That no Justice of Peace shall order Relief to any poor Person until Oath be made before him, *&c.* There is a great Difference where a Judge has Power to determine indefinitely, and where only under particular Circumstances; for when the Statute gives him a Power to act indefinitely, he is a proper Judge what Evidence is necessary to support the Fact; but when his Power is limited under particular Restrictions, as to be upon Oath, *&c.* he must confine himself within these Restrictions, and must follow the express Words of the Statute; and he must appear

appear to have done so upon the Face of the Order; as in *Carth.* 365. Order of two Justices for Removal of a poor Person; and the Order recited, that upon Complaint made concerning the poor Person, *&c.* they had so ordered, *&c.* And it did not appear by the Order who it was that made that Complaint; and because the 13 & 14 *Car.* 2. *c.* 12. says, it must be upon Complaint of the Churchwardens and Overseers of the Poor, therefore it is absolutely necessary in the Body of the Order to shew that it was done upon the Complaint of the Churchwardens, *&c.* for otherwise the Justices have no Authority to make it. This comes exactly up to the present Case: The Statute requires that the Order be made upon Oath, or otherwise the Justices have no Jurisdiction. It has been often laid down as a Rule of this Court, that nothing shall be presumed in Support of an Order; in this Case the Court must presume every Thing to support the Order, that it was made upon Oath, that the Overseers were regularly summoned, and that there was no Justice residing within the Parish; for unless these Facts are presumed, the Order cannot stand. *Vide* the Statute, which expresly provides that no Justice of Peace shall order Relief to any poor Person, until Oath be made unto him of some Matter which he shall judge a reasonable Cause of giving such Relief, and until such Justice has summoned two of the Overseers of the Poor to shew Cause why such Relief should not be given. *Vide Carth.* 58. *The King* and *Martin:* The Sessions confirmed

confirmed a Poors Rate, but did not set forth that it came before them upon Appeal; and for this Reason the Order was quashed, for the Sessions have not an original Jurisdiction.

Mr. *Fazakerly* took another Objection, That it did not appear the Person relieved had gained a Settlement; for it is only said for the Relief of a Pauper within the Parish: But the Court over-ruled this Objection, for though perhaps it might not be good in the Case of a Settlement, yet it is well enough in this Case. Mr. *Fazakerly* then objected to the Merits of the Order, that the Justices had no Juris-
(254.) diction to order a gross Sum to be paid to a third Person for the Relief of a Pauper; and cited the Case of *The King* and *the Inhabitants of Bensham*, 7th of the late Queen, where it was so adjudged; and the Case of *The King* and *the Inhabitants of Woolbury*, *Hil.* 6 *G.* 2. And upon this Objection the Court was of Opinion that the Order should be quashed, but gave no Opinion as to the three first Objections.

Mr. *Parker* then objected, that this Order was not properly before the Court; and took Exception to the *Certiorari*, because it varied from the Order; for the Order was that the Overseers should pay 5 *l.* to Mr. *Simon Barker*, for curing a Pauper; and in the *Certiorari* it was ordered to pay 5 *l.* to Mr. *Simon Baker*, without the (*r*), Surgeon; and for this Reason the *Certiorari* was quashed.

Gore

Gore *v.* Gore, with all the Arguments of Counsel.

Devise.

THE Case was sent out of Chancery for the Opinion of the Judges of this Court, and the Case in Effect was this: *William Gore* being seised of divers Manors and other Tenements in Fee, devised them to Trustees for the Term of 500 Years, with a Power to cut down Wood, or sell any Part of his Estate in order to raise Money for the Payment of his Debts, and also to raise several other Sums which he had devised to his younger Children for their Portions, with Remainder in Tail to the first and every other Son of *Thomas* his eldest Son to be begotten, and upon Failure of such Issue, then the Remainder to his Son *Edward* in Tail Male, Remainder to his Son *William* in Tail, Remainder to his own right Heirs. He likewise devised an Annuity of 50 *l. per Ann.* to *Thomas* his eldest Son, and then takes Notice of the Reason why he made no greater Provision for him, *viz.* because he was a Spendthrift, and his Father had already expended and paid considerable Sums upon his Account. There was likewise a particular Direction, that if his Estate should afterwards come to *Edward* or *William*, that then the Money devised to be raised for their Portions, should not be raised. Upon the Construction of this Will, there arose two Questions; 1*st*, Whether the Limitation to the first Son of *Thomas* (he having no Issue at that Time) was a good Limitation. And 2*dly*, If it was

a

a good Limitation, in whom was the Freehold after the Teſtator's Death veſted during the Contingency.

Mr. *Bootle* as to the firſt Point argued, That the Deviſe to the firſt and every other Son of *Thomas* (he having no Iſſue then nor at the Time of the Teſtator's Death) was void. If it can take Effect at all, it muſt be (255.) either by way of a contingent Remainder or an executory Deviſe: The firſt it cannot be, becauſe no Freehold to ſupport it; for whenever the Inheritance is granted upon a Contingency, the Limitation is void, unleſs there be a Freehold to ſupport the Contingency; neither can it operate by Way of executory Deviſe, becauſe the Contingency cannot ariſe within the Time preſcribed by Law. It is poſſible indeed that *Thomas* might have a Son within forty Weeks after the Teſtator's Death, yet that is a Poſſibility only, and ſuch Son could not take it until after the Determination of the 500 Years Term. Executory Deviſes are not of long Eſtabliſhment by Common Law, and the Judges have always held the Time limited for the Contingency to ariſe in, was not to be extended. 30 *Eliz.* It was determined that executory Deviſes muſt ariſe within the Compaſs of one or two Lives at the furtheſt; and though it hath been limited to ariſe after the Determination of ſeveral Lives, yet thoſe Lives were all exiſting at the ſame Time, and ſo is all one as if limited but to one Life. In *James* the Firſt's Reign, the Judges thought it Time to limit the Bounds of ſuch Deviſes, *Cro. Jac.* 459.

459. *Palmer* 253. 2 *Jones* 15. 1 *Roll. Abr.* 613. Where the Judges said they would not permit an executory Devise to exceed the Devise in *Matt. Manning*'s Case, for the Inconveniency which they had perceived by it. In the 13 *Car.* 2. Lord *Bridgman* Ch. J. said, if *Matt. Manning*'s Case was to be adjudged again, he questioned not but the Judgment would be otherwise, but they would not extend their Resolutions further or more favourably to such Devises. 1 *Sid.* 37. And so it was held in 3 *Keb.* 122, 178. the Case of *Carpenter* and *Smith*, which was a springing Use but falls within the same Rule, and there it is held, that the furthest such Devises are to be carried, is within the Compass of one or two Lives in being. *Pasch.* 11 *W.* 3. the Case of *Scatterwood* and *Edge*, 1 *Salk.* 229. It was held that a Devise to the first Son of *A.* (*A.*) having none at that Time was void, and in that Case *Treby* Ch. J. said, that an executory Devise to arise within the Compass of a Life or Lives was good, because the Candles are all lighted at once, but they were not to be carried one Step further by his Consent; because these Limitations make Estates unalienable, every Devise being a Perpetuity as far as it goes (that is) an Estate unalienable though all Mankind were to join in the Conveyance. A Limitation to the Heirs of a Man may be good by Way of executory Devise, because it takes Effect immediately after the Death of the Ancestor; but where the Devise is to the first Son of *Thomas*, and he has no Son at the Time of

the Teſtator's Death, the Limitation is void; ſo that it plainly appears by the Reſolutions abovementioned, that the Judges have always been diſpoſed to narrow the Bounds of theſe Deviſes as far as was conſiſtent with Determinations of former Caſes. Taking it therefore that the Time in which executory Deviſes muſt ariſe is ſettled, and that ſuch a Deviſe muſt ariſe within the Compaſs of a Life or Lives in being, it will be neceſſary to conſider how the Deviſe in the preſent Caſe agrees with this Principle of Law. *William Gore* deviſes his Eſtate for 500 Years, and after the Determination of that Eſtate, to the firſt Son of *Thomas Gore* in Tail, Remainders over to his Son *E.* and *W.* ſucceſſively; *Thomas* had no Son at the Time of *William*'s Death, and perhaps might have none during his own life, and though he might have a Son within 40 Weeks after his Death, yet ſuch a Deviſe is not good according to the Principles which hath been before inſiſted upon, for it does not take Effect within the Compaſs of a Life. It may be objected that here is no Danger of a Perpetuity, becauſe the furtheſt it can be extended is no more than 40 Weeks after the Death of *Thomas*; but by the ſame Reaſon that it may be extended 40 Weeks it may be extended as many Years. Suppoſing in the Caſe of a ſpringing Uſe or a Contingent Remainder, and either of them ſhould ariſe within a Year after the Time limited by Law; would the Eſtates which were before united and conſolidated open again to let in the Contingency? They certainly would not: By the

(256.)

the ſame Parity of Reason, an executory Deviſe ſhall not; for the Inconveniencies that would be introduced by ſuch a Conſtruction are the ſame in both Caſes. This Caſe is the ſame or rather ſtronger than the Caſe in *Salk.* for there the Deviſe to Truſtees was only for the Term of eleven Years, whereas this is for 500 Years. He alſo ſaid that the Words *Procreatis vel Procreandis* made no Difference, for they may be both mutually extended to Iſſue begotten or to be begotten; but what makes this Caſe the ſtronger is, that the Deviſe is not to take Effect till after the Determination of 500 Years: And though there are Truſts annext to this Term, yet that makes no Difference; for now we are in a Court of Law, and muſt conſider it in a legal Senſe, and the Law takes no Notice of Truſts. It muſt therefore be taken as an abſolute Term, and ſhould the Truſtees declare upon it, they muſt plead it as ſuch, as in Caſe of a Mortgage, which is no more than a Pledge of Lands for the Security of Money, yet it is always pleaded as an abſolute Conveyance. In the Caſe of *Scatterwood* and *Edge*, *Treby* Ch. J. held, that an executory Deviſe depending upon a Term, and to ariſe within a reaſonable Time was good, and that 20 nay 30 Years had been held a reaſonable Time; but this hath never been carried beyond the Term of one Life. The Antecedent Term in this Caſe, and which muſt determine before the Limitation can take Effect is 500 Years; and this Difference was before taken in 1720 in this Court, and the Judges then held that

an executory Devise, which could not take Effect 'till after the Expiration of so long a Term, was void, and gave Judgment accordingly. If the Devise in this Case be good, it (257.) must necessarily create a Perpetuity: For if the Limitation to the first Son of *Thomas* be good, it must be by Way of executory Devise, and then it consequentially follows, that the Limitation to *E.* & *W.* which depend thereupon must be by Way of executory Devise likewise, and so are not to be defeated by a Recovery or otherwise. As to the second Question he said, should the Devise to the first Son of *Thomas* be admitted to be good by Way of executory Devise, he could not conceive what would become of the Freehold after the Death of the Testator, and before *Thomas* had Issue born; but if the Devise to the first Son of *Thomas* be void, the Remainder is executed in *E.* and the Freehold vested in him *eo instanti* the Testator dies. 1 *Rep.* 154. 7 *Ed.* 3. *Fo.* 19. *A.* seised of Lands in fee, conveys them to *B.* for Life, Remainder to his Issue in Tail, Remainder to the Feoffor for Life, Remainder to *C.* for Life; the Remainder to the Feoffor is void, and the Estate in *C.* takes Effect upon Determination of Estate Tail.

Serjeant *Chappell contra:* The Devise to first Son of *Thomas* is a good Devise either by way of contingent Remainder, or as an executory Devise. As to the First, he said *Thomas* took an Estate for Life by Implication, which was sufficient to support a contingent Remainder. *Cro. Eliz.* 744. *Shailard* and *Baker*.

In

In Wills the Intent of the Testator is to be considered, and therefore the Devise of Lands equally to be divided makes a Tenancy in common. *Poph.* 188. In this Case the Testator takes Notice that *Thomas* was unmarried, and therefore when he Devises his Lands to the first Son of *Thomas*, it must be his Intention that the Freehold shall descend 'till such Issue be born. 1 *Inst.* 42. How must the Estate go 'till a Son be born? It cannot go to *E.* or *W.* because it appears to be the Intent of the Devisor, that neither of them should take 'till the Death of *Thomas* without Issue Male: It must therefore necessarily go to the Heir at Law in the Interim, and this *ex favore Legis*, for the Respect the Law always pays to the next Heir: But should the Court be of Opinion, that this cannot rise as a contingent Remainder, yet it will arise by Way of executory Devise. A Devise to the first Son of *J. S. per verba de præsenti*, and *J. S.* hath no Issue at that Time, is void, but here the Devise is *in futuro*, to the first Son to be begotten. *Vid.* 1 *Salk.* 230. With regard to a Contingency, there is a Difference when the Fee is given over, and where it remains in the Devisor till the Contingency happens. The Devise in this Case is to the first Son of *Thomas*, who had no Issue at that Time, so that the Freehold must in consequence remain in the Interim in the Devisor and his Heirs. 1 *Roll. Abr.* 612. *Cro. Jac.* 394. 1 *Roll. Rep.* 318. A Devise to an Infant in *Ventre sa Mere* is good by Way of executory Devise, and the Land shall go to the Heir in the Interim.

Interim. *Sid.* 253. 2 *Mod.* 292. 1 *Roll.*
(258.) *Abr.* 609. *Noy* 43. *Salk.* 230. *Raym.* 83.
It is laid down as a Rule, that an executory Devise must arise within one or two Lives in *Esse*; the Case falls within the Rule, for here the Contingency must happen in the Lifetime of *Thomas*, or immediately after his Decease: But it is objected, here is a Term antecedent to the Devise which is for 500 Years, and must determine before the executory Devise can take Effect: But a Term of Years is not of any Consideration in Law, no more than a Charge attending the Inheritance. *Salk.* 254. And as soon as a Son is born to *Thomas*, the executory Devise is vested and the Contingency gone.

Mr. *Bootle* by Way of Reply. By the Devise *Thomas* was to have an Annuity of 50 *l. per Annum*, and no more, for the Testator takes Notice of him, that he was a Spendthrift, and should have nothing to do with the Estate, so that it is impossible *Thomas* should take a Freehold by Implication; where is the Freehold to be vested then? It is insisted upon that the Freehold by Implication of Law is vested in the eldest Son: Had this Construction prevailed, the Limitation in *Salk.* could never have been disputed. It is further insisted upon, that it was the Intent of the Devisor, that *E.* and *A.* should not take till after the Decease of *Thomas* without Issue Male. In Construction of Wills the Intention of the Testator shall prevail, so long as that Intention is consonant and agreeable to the Rules of Law, but where it is repugnant and inconsistent with

with the Rules of Law it is to be rejected, and in this Case, whatever the Intention of the Testator was, since the Limitations of the executory Devise had exceeded the Bounds prescribed by Law, it is bad. As to the Cases cited by Mr. Serjeant, he said the Case of *Cotton* and *Heath* in *Roll's Abr.* was not reported by the Judges to whom the Case was referred, which much lessens its Authority. The executory Devise in *Raym.* 82. was to arise within the Term of 15 Years, which does not come up to the present Question. A Devise to an Infant in *Ventre sa Mere* must happen within the Compass of a Life, and so falls within the Rule, that executory Devises must arise within the Compass of a Life or Lives in being or not at all. But it is said there is no necessity to extend the Time of *Thomas* having a Son to the Time of his Death, for it is probable he might have Issue Male in his Life-time. This is a Possibility only, for he may not have a Son 'till 40 Weeks after his Death, and the Law goes upon Certainties, and will not wait such an Expectancy as the dying without Issue. As to *Bate*'s Case, *Salk.* 254. the Remainder was executed and therefore the Wife was intitled to Dower. It is said there is no Danger of a Perpetuity in this Case, for when the Contingency happens the Estates are all vested; but how are they vested by Way of executory Devise? For the subsequent Premises depend upon the executory Devise, which cannot be barred by Recovery, *&c.* and so creates a Perpetuity.

Raymond C. J. There are two Ways to make (259.)

make this Devise good; by way of a contingent Remainder; or an executory Devise. The first it cannot be, because no Freehold to support it. *Thomas* is cut off by Will, so no Estate by way of Implication can arise to him. The only Question is, whether this is good by way of executory Devise; and this depends upon Construction of what Time the Law allows for such Devises to arise in. It does not appear that any certain Time has hitherto been settled. A Life or Lives in being hath been held a competent Time; but whether it may not be carried further is not so clearly settled. It has been argued, that the Contingency in this Case cannot vest 'till after Determination of 500 Years; but the Contingency does not depend upon the Expiration of the Term; for *Eo instanti* the Contingency arises the Estate is vested. The Cases cited do not come up to this Case, the chief one relied on is the Case of *Scatterwood* and *Edge*. 1 *Salk*. 229. *Treby* C. J. was of Opinion, that the Time of limiting executory Devises was to be carried no further: But in that Case there is Contrariety of Opinions, and that Case was not determined upon this Point: But the Limitation there was considered as an immediate Devise; and when a Writ of Error was brought in *B. R.* upon that Judgment, *Holt* C. J. was of Opinion, that the Time in which an executory Devise was to arise, was not settled. And Note, this present Case was determined in *B. R.* and adjudged that the Devise to the first Son of *Thomas* to be begotten, he having no Issue at that Time, was void: But *Raymond*

mond C. J. said, that he was not satisfied with that Determination. (*Vide* 1 *Salk.* 226. *Goodright* and *Cornish.*) And therefore in *Hillary* Term 6 *G.* 2. it was again argued by *Peer Williams* for the Plaintiff, and Mr. *Fazakerly* for Defendant. And Mr. *Peer Williams* said, that this Devise was not void in its Creation, because by Possibility *Thomas Gore* might have had a Son before the Death of the Testator; and tho' it is no absolute Will during the Life of the Testator, yet to many Purposes it is a good Will, and shall take Effect from the Time of its Execution, as in 1 *Salk.* 237. the Case of *Bunter* and *Coke.* A Devise of Lands is not good if the Testator had nothing in them at the Time of making the Will; and tho' he should afterwards purchase Lands, yet they would not pass by the Devise. The Limitation over to the first Son of *Thomas* might have been good when the Will was made, and he might have taken by way of Remainder notwithstanding the Term; for had a Son been born in the Life-time of the Testator, it might then have vested as a Remainder. This was possible at the Time of making the Will; and it is held in 2 *Saund.* 388. that where a Limitation over by Will may operate as a contingent Remainder, it shall never operate by way of executory Devise. In the present Case it might have operated as a contingent Remainder, *Ergo, &c.* But it is objected, that this being a Devise for Years only, it cannot operate as a contingent Remainder because no Freehold to support it; neither can it take Effect as an executory Devise, (260.)

Devise, because it is a Limitation by Words *in præsenti* and not *in futuro:* The Words indeed are to the first Son of *Thomas* to be begotten, but that makes no Difference, for the Words *procreatis & procreandis* are of the same Effect, and so it is expresly held by my Lord *Coke* in his 1 *Inst.* 20 *b.* And as this is the natural Construction that has always been put upon those Words in a Deed, so they have been equally adjudged to carry the same Construction in a Will. 2 *Vern.* 545. the Case of *Cook* and *Cook.* Supposing in the present Case where the Devise is to the first Son to be begotten, *Thomas* had then had a Son born, this Son should have taken, and so he should altho' *Thomas* should have had another Son born afterwards. And so is the Case in *Vern.:* The Words are used promiscuously, as it would be now dangerous to put another Construction upon them. He further urged, that this Limitation over could not take Effect as an executory Devise, because it could not arise within the Time settled by Law for that purpose; for it is not to commence till after the Determination of the 500 Years Term; and tho' it has been held good when the Limitation over was to arise after the Determination of a Term for 10, 20, or 30 Years, yet that seems tacitly to exclude Limitations over where the Term is for a far greater number of Years, as in this Case. There are two Reasons why this Devise to the first Son of *Thomas* is void; first, because there is no Freehold to support it, therefore it cannot be good as a Remainder; and secondly, it cannot operate

operate by way of executory Devise, because it is expresly limited by way of Remainder. He said he would not trouble the Court with explaining the Nature of executory Devises, and the Time prescribed by Law for their Commencement, but the prescribed Time in which they are to arise has been sufficiently settled; and it has been said by Judges that they were sorry they had gone so far. In the Case of *Scatterwood* and *Edge*, it was said by *Treby* C. J. that they would not carry them one Inch further: But said Mr. *Bootle* had spoken so fully to this Point, that he would not trouble the Court with any further Repetition. The chief Point that he insisted upon was, that this Limitation over to the first Son of *Thomas* could not vest, till the Term for 500 Years was spent. For in the first place the Devise is to Trustees for 500 Years, and after Expiration of that Term, then the Remainder over, so that the Term must expire before the Remainder can vest. If a Court of Law will take any Notice of these Trusts in Equity, it must at the same Time be considered that the Trust may last as long as the Term; for the Trustees in this Case are not only to pay Annuities for Life, but they are likewise to raise Money for younger Childrens Portions, and this Provision is not to take Effect 'till after *Thomas*'s Death, so that these Portions (261.) may not have been raised as yet, and perhaps may not these many Years. In the Case therefore of a Trust of a Term which must continue so long as this; a Court of Law will not take Notice of it as a Trust, but will consider

consider it as an absolute Term, and therefore the Limitation over cannot arise 'till after the Determination of the Term. Consider the Nature of an executory Devise, which he said must be considered as an original Devise, and when it is not limited to arise by way of Remainder, and in effect cannot arise as a Remainder, it is properly called an executory Devise. Supposing the Testator had devised to *A.* for 500 Years, and after to the first and every other Son of *Thomas Gore*, he having no Issue Male living at the Time of the Devise, it is certain no legal Estate could have vested at that Time, for if any Estate could have vested, it must have been by way of Remainder: For supposing *Thomas* to have had a Son, the Estate must have been then vested in the Son as a Remainder, and when by Possibility the Estate may vest as a Remainder, it can never afterwards take effect by way of executory Devise. But in this Case it is impossible the Remainder could have vested before the Expiration of the Term; for till that Time the Devisee had no Interest that was assignable, as he must have had provided the Remainder was vested. A Devise is made of a Term to *A.* for Life, Remainder to *B.* *B.* has only a Possibility which is not assignable in Law, nor even in Equity where the Limitation is voluntary. Every executory Devise is to be taken as an original Devise in it's self, and independent of any preceding Term, and must be considered as if no Term had been limited. To draw the Rule then to the present Case, supposing the Limitation had been

been to the first Son of *Thomas* to commence at a future Day, the Son takes nothing in the Interim, as in *Lutw.* 798. If a Man devises Lands to *A.* six Months after his Death, the Lands shall descend in the mean Time, and therefore nothing vests in the Devisee 'till the Time appointed. Where the Limitation is to arise at the End of six Months, or six Years, it is the same Thing; for during that Time nothing vests in the Devisee, and consequently he has nothing in him to grant or assign over, and cited *Cro. E.* 678. (*sed Qu.* how applicable). The only Question that remains is, how long the Law allows for an executory Devise to arise in; and this Point seems well settled in the Case of *Scatterwood* and *Edge*, where it is said, that an executory Devise to arise after the Expiration of a Term for 20 or 30 Years may be a good Limitation, which implies that where the Devise is to arise after the Determination of a longer Term it is then void, tho' the Devise be to Persons in *Esse*, *a fortiori* must be void where the Limitation is to Persons not *in esse*. Supposing the Devise to the first Son of *Thomas* had been of different Lands, as if a Man is seised of two Manors, *viz.* (262.) of *Dale* and of *Sale*, and devises the Manor of *Dale* to Trustees for 500 Years, and that upon and after the Determination of that Term, then the Manor of *S.* shall go to *A.* This surely could not be good by way of executory Devise, and yet this Case in effect comes up to the present Case, and plainly tends to create a Perpetuity. The Reason why executory Devises have been supported is,

is, becauſe the Freehold deſcends 'till the Contingency arises, for the Freehold cannot be in Abeyance; but in this Caſe it cannot deſcend becauſe the Heir is expreſly excluded from taking. Suppoſing in this Caſe the Term had been but for five Years only, and after to the firſt and every other Son of *Thomas*, with a Remainder to a third Perſon for Life, there is no Doubt but the Remainder over for Life is good, for during the Term the Eſtate is in the Truſtees, and if *Thomas* have no Son living at the end of the five Years, then he in Remainder for Life muſt take; and the Remainder being once veſted can never afterwards be deveſted to make way for the contingent Remainder. Agreed that where the Eſtate deſcended it was liable to be deveſted, but where it enures by purchase it is otherwiſe. In the Caſe of *Scatterwood* and *Edge* the Freehold deſcended, and there was no intermediate Remainder veſted; ſaid there was no Caſe in the Books where a Contingency has been limited to ariſe after the Expiration of a Term for Years with a Remainder over to another *in eſſe*, who takes by Purchaſe, that in ſuch Caſe the Freehold ſhould deſcend, much leſs in the preſent Caſe; for here *Thomas* is not only expreſly excluded, but a Rent-charge is likewiſe deviſed to him, which muſt be merged provided the Freehold ſhould deſcend to him. For to every Rent-charge a Diſtreſs is incident, and it is abſurd to ſay a Man can diſtrain upon himſelf, which muſt be the preſent Caſe, ſhould the Fee deſcend to *Thomas* and the Rent continue

and

and not be merged in the Fee. If therefore the Fee ſhould deſcend, it muſt be contrary to the expreſs Words and Intention of the Teſtator, and the Creation of the Rent thereby becomes nugatory. Here is a Perſon *in eſſe* capable of taking by the Deviſe by way of Remainder, and therefore the Limitation over to the firſt, *&c.* Son of *Thomas* ſhall not by an unneceſſary Conſtruction be held good to defeat the Eſtate in Remainder which was before veſted, and cited the Caſe of *Goodright* and *Corniſh*, 1 *Salk.* 226. *A.* having Iſſue two Sons, *John* and *Richard*, deviſes Lands to *John* for 50 Years if he ſhould ſo long live; and as for my Inheritance after the ſaid Term, I deviſe the ſame to the Heirs Male of the Body of *John*, and for Default of ſuch Iſſue, then to *Richard*. The Court held this Deviſe to the Heirs Male of the Body of *John* to be void in its firſt Creation, for the want of an Eſtate of Freehold to ſupport it, it was void as a Remainder, and they ſeemed not to think it an executory Deviſe, becauſe it was limited as a Remainder. It may be ſaid, it was the Intention of the Teſtator to put the Freehold in Abeyance, but the Law will not regard his Intention as to this reſpect. Suppoſe *Thomas Gore* had a Son living at the Time of the Deviſe, who ſhould afterwards die without Iſſue, and the Eſtate had gone over to the next Heir in Remainder, and then *Thomas* has a ſecond Son; the Law will not ſuffer him in Remainder to be deveſted of his Eſtate, although it was the Intention of the Teſtator that his ſecond Son ſhould have taken in

(263.)

in this Case: And so he concluded that if the Limitation in the present Case to the first, *&c.* Son of *Thomas* be not good, because by Possibility it might have vested as a Remainder, and therefore shall not vest as an executory Devise; or if it be so remote that it cannot arise within the Time settled for all executory Devises to arise in; or if being limited by way of Remainder, it cannot by Construction be intended as an executory Devise; if in any one of these Points the Court is of Opinion for the Plaintiff, he must have his Judgment, and the Defendant has no Title. Mr. *Fazakerly contra:* This is good by way of executory Devise, and the Freehold in this Case must descend to the Heir at Law, not by the Words of the Devise, but by Operation of Law. It is clearly the Intention of the Testator that the first Son of *Thomas* should take. He said he would not dispute that the Limitation was strictly agreeable to the Rules of Law, but there was no Repugnancy to them, and when the Intention of the Party may be so far collected, as to make them agree and consistent with the Rules of Law, the Court will support it. If this is considered as an immediate Devise *in præsenti*, it is unquestionably void for want of a Freehold to support it; but if it is considered as a future Devise, then the Limitation is good. It is insisted upon, that the Words *procreatis vel procreandis* are in Effect the same, and must be taken to mean the same thing, as in 1 *Inst.* 260. He agreed that in point of Limitation they both bear the same Construction, for in that

that Case the whole Estate Tail is in the Ancestor, and when the Issue come to take they are in by Descent and not by Purchase. And so is the Case in *Vernon*, and cited the Case of *Darbinson* and *Beaumont*, 9 *Ann. in Canc.* [1 P. Wms. 229.] A Devise to *John Peirce* for 99 Years, Remainder to his first and other Sons in Tail, and in Default of such Issue, then to the Heirs of my Aunt *E. Long* begotten then living, (she having three Sons living at that Time); and in that Case it was insisted, that the Words begotten or to be begotten are of the same Effect and Meaning: Yet the Court held that they imported an immediate Devise, notwithstanding the Words, Heirs of the Body of *E. Long* could have no Heirs in her Life-time, and so adjudged her Issue to take immediately: Which plainly proves, that though these Words are sometimes used and considered in the same Sense, yet the general (264.) Construction is always to make them answer the Intent of the Testator, and to vary the Meaning of them so as the Limitation may take Effect. In the Case of *Scatterwood* and *Edge*, it was held, that had the Devise been to the first Son to be begotten, that the Limitation in that Case had been good as an executory Devise. In the present Case here are future Words. To the first Son of *Thomas* to be begotten, and it is plain from the Sense of the Will, that it was the Testator's Intention, that it should take Effect as a future Devise, and the Court will rather chuse to presume something in Support of a Limitation, than reject Words in order to destroy it; the

Testator in his Will takes Notice that *Thomas* was not married, and in case *Thomas* has a Son, he appoints Guardians to take Care of his Education. It is plain therefore the Testator could not intend his Devise should take Effect in present, and as there are future Words, why should they be constrained to a Limitation *in præsenti*. In 1 *Lev.* 135. the Case of *Snowe* and *Cuttler*, it was held, that a Devise to an Infant *in Ventre sa Mere* was good notwithstanding the Case in *Dyer* 304. which upon looking into the Record was not found to warrant the Opinion there reported; and cited the Case of *Bate* and *Amherst*, *T. Raym.* 82. This therefore must be taken as a future Devise, and then there is an End of the Objection. The only Question that now remains is, whether this Construction of Law can be good so as to arise within the Time limited. The first Time this Case was argued, it was said, that this executory Devise might not take Effect, till nine Months after the Death of *Thomas*; but in this Case the Contingency has happened within the Time, and so no Danger of a Perpetuity. It might be difficult to tell how long the Law will allow for executory Devises to arise in, but it will certainly allow so much as may be thought reasonable for a Man to make Provision for his Family, and Nature lays all Men under the same Obligation to provide for Posthumous Children as for those *in esse*. Why therefore should this Case be thought to go farther than is allowed by Law? I don't know that any precise Time has as yet been settled; and though

though *Treby* C. J. thought fit to carry them no further than for Life or Lives in being, yet a Latitude has always been given according to the Circumstances of a Case, as in *Moor* 846. *Blanford* and *Blanford*, and in 1 *Roll. Abr.* 612. *p.* 3. And notwithstanding *Treby* said the Time was sufficiently settled, yet the rest of the Judges were of a different Opinion. Wherever an executory Devise has been appointed to arise within such a Time as to avoid carrying it to a Perpetuity, it has always been held good. In *Show. Parl. Cases* [p. 137], Sir *Evan Lloyd*'s Case, the Contingency was carried the Space of 12 Months beyond the Time, and that was by Deed, which is stronger than the present Case; for the furthest that this can go is only nine Months. 1 *Vern.* 234 and 304. The Compass of 21 (265.) Years for a Contingency to arise in was held good, because the Time is circumscribed. The Limitation in this Case is for the Provision of Posthumous Children, and is founded upon great Reason and Justice. It would be a great Objection to the Law was it so straitlaced, that a Man could not so limit his Estate, as to make Provision for the Children that might be born after his Death. He cited the Case of *Hodgkins* and *Andrews* at the Rolls in 1730. upon a Marriage Settlement, six hundred Pounds belonging to the Wife was given in Trust to the Wife for Life, and if the Husband should survive her, to him for Life, and after to the Heirs of their Bodies, payable at twenty-one or Marriage, but in Default of Issue, or if it should happen that

such Issue should die before the Time, Remainder over to one *Newland* and another. The Wife had Issue two Daughters, who both of them died before Marriage or the Age of twenty-one. The Father took out Administration, and insisted that he was absolutely intitled to the 600 *l.* Fortune; but the Limitation was held good by the whole Court, for it did not extend to create a Perpetuity, and if the Issue had died but one Day before the Age of twenty-one, yet the Limitation over had been good, and the Remainder should have taken Place. In this Case, the Estate is to vest as soon as the Contingency happens, and no Occasion either from the Nature of the Thing or the Intention of the Parties to wait the Expiration of the Term. It is in the Power of the Court to make a favourable Construction of Words in order to support the Intention of the Parties, and in 6 *Rep.* 16, *b. Wild's* Case, the Word Issue, is construed differently in Support of the Testator's Intention; so have the Words *procreatis vela procreandis.* This is a Contingency 'till a Son is born, and then it is no more a Contingency: For supposing there had been a Son, it had then been a Remainder vested. 3 *Rep.* 13. Suppose in this Case there had been no Term, but the Devise had been to the first Son of *Thomas* when born, such a Limitation has been held good, and there is no Reason why a Term should make any Difference; for if it should, it would in Effect put it out of the Power of a Man to make Provision for his younger Children, or the Payment of his Debts. Since therefore

therefore a great Inconvenience may happen on the one Side, and there can be none on the other, ſhould this be conſtrued a good Limitation, the Court will always put the moſt favourable Conſtruction, and ſo was the Opinion of Lord *Hobart*. It is allowed that when a Son is born he may take Advantage of a Forfeiture or Surrender; which makes it plain that the Eſtate veſts in him before the Expiration of the Term, for if he had no Intereſt during the Term the ſurrender would be void. If a Term of Years is raiſed for Payment of Debts, the Surplus ſhall go to the Heir or to him in Remainder. In this Caſe here is a Term of 500 Years raiſed for a particular Purpoſe; but the firſt Son is not to wait the Expiration of it. In Equity, it is no more than a Security, and after that is ſatisfied it is then always conſidered as a Term attending the Inheritance. As to the Teſtator's Intention, it is plain from the Codicil he intended the Remainder ſhould veſt before the Term was ſpent. For he there takes Notice that if *Thomas* ſhould have a Son, the Truſtees ſhould be his Guardian, and have the Care of his Education and of his Eſtate till the Age of twenty-one; and can it be ſuppoſed that he would have made this Proviſion, unleſs he intended the Rent to veſt as ſoon as the Contingency ſhould happen. It is objected, here is no Proviſo to merge the Term. There is no Occaſion, for when a Man makes his Will, he conſiders how the Limitation will be taken in Equity as well as at Law, and that the Term is only raiſed as a Security.

(266.)

rity. If a Son had been born in the Life-time of the Teſtator, it is agreed that the Limitation muſt have veſted as a Remainder. This is giving up the Queſtion, for if the Birth of a Son in the Life-time of the Teſtator would have veſted the Remainder, this clearly ſhews that the Remainder muſt veſt upon the Birth of a Son, and ſo no Difference where a Son is born, living the Teſtator, or afterwards, for whenever a Son is born, the Remainder will veſt. It is held in *Paul's* Caſe, That as ſoon as the Contingency ariſes, the executory Deviſe takes Place, and when it is once veſted it is no longer as an executory Deviſe, but becomes an Eſtate in Poſſeſſion. The Caſe which has been put, of the two Manors, is not to the Purpoſe; for there the Deviſe of the ſecond Manor cannot take Effect, till after the Term raiſed out of the firſt Manor is expired. It has been a Queſtion in this Caſe, where the Freehold ſhall be during the Contingency; for ſay they it cannot deſcend, becauſe it is given from the Heir at Law. And ſo it is in all executory Deviſes. But it is not under the Will that the Heir takes in theſe Caſes, but by Operation of Law. In *Lewis Bowles's* Caſe the Remainder veſts by Purchaſe, but upon raiſing of the Contingency, it opens again to let in the Contingency: And theſe Caſes depend upon the Conſtruction of the Statute of Wills, which has always a Regard to the Intention of the Parties. In the Caſe of *Scatterwood* and *Edge*, provided the Limitation had been good, as to the firſt Son to be begotten, the Remainder over

over would have vested, had it not been for the Contingency: but this was never held to be an Objection in that Case. As to the Case of *Goodright* and *Cornish*, that was not determined upon this Point, but the Reason there given is, because it was an immediate Devise, and therefore not being capable to take Effect in point of Limitation of Law, by way of Remainder, it could not as an executory Devise, because limited to take Effect in present; and so concluded that in all Cases where the Intention of the Parties can be preserved without destroying the Rules of Law, it is the Duty of the Court to support the Intention of the Parties: Here it may be supported without impeaching the Rules of Law; therefore the Court will consider this as a good Limitation. (267.)

Stood over for the Opinion of the Court. And after great Deliberation Judgment was given that this was a good executory Devise.

Jacobs *and* Crosby.

Assumpsit.

IN Assumpsit Plaintiff declared upon the mutual Agreement, that the Defendant in Consideration that Plaintiff would transfer 2000 *l. York Buildings* Stock he promised, *&c.* and avers that on the twenty-ninth of *February* being the Day appointed, the Transfer Books were opened, and continued so from 3 to 5, which was the usual Time, that he attended at the Transfer House, and tendered, *&c.* Upon Demurrer Mr. *Reeves* argued for the

the Defendant, that all Declarations ought to be certain like the Case of Indictment, otherwise the Defendant may take Advantage of it upon Demurrer. The Facts as they are stated in this Declaration may be true, and the Plaintiff not intitled to recover; it is only alledged that he came to the House in general, and then tendered, *&c.* but it is not said, that was at the Place of Transfer and tendered, *&c.* The Tender must be made in the most notorious Place; as in a Lease upon Condition to pay Rent, the Tender must be made at the Door of the House, *&c.*

Cur': It is laid in the Declaration, that the Delivery of the Stock was to be made at the Transfer House, and it is averred that he attended at the Transfer House, and a House may consist of but one Room.

Mr. *Reeves* objected, that the Stock tendered by the Plaintiff did not appear to be the same Sort of Stock that was contracted for, which was that the Plaintiff should deliver so much common Stock, and the Tender was of 2000 *l.* Joint Stock, which is different from the Contract, and the Court cannot take it to be the same Stock.

Mr. *Marsh con':* The Agreement was to deliver 2000 *l.* Common Stock, and the Averment is that he tendered the aforesaid 2000 *l.* Joint Stock. *Prædict'* is a good Word of Reference, and the Word *Conjunct'* be rejected, it can have Relation to nothing but 2000 *l.* Common Stock that was agreed for, and therefore a good Cause of Action upon the Face of the Declaration.

Cur':

Cur': Had the Word *Conjunct'* been the Averment that he tendered *Prædict'* Stock it had undoubtedly been good: The Word *Prædict'* always aids even in the Name of the Parties, and there is no direct Repugnancy in this Case between the Common Stock and the joint Stock. *Et sic Judicium pro Quer'* upon both Points. (268.)

The King *and* Saunds. Trin. 6 & 7 G. 2.

Information.

FOR an Information in the Nature of *Quo Warranto*, to shew by what Authority *Saunds* acted as Recorder of the Corporation of *Easham*. The Constitution of this Corporation is vested in the Mayor, Aldermen, capital Burgesses, a Recorder and Chamberlain, all which put together constitute the Common Council: And by a Clause in the Charter the Mayor, Aldermen, and Burgesses, are to proceed to the Election, *&c.* as Places shall become vacant; But by a subsequent Clause it is expressly provided, that the Chamberlain shall not be present at the Election of a Recorder, nor the Recorder at the Election of a Chamberlain. So that a Recorder and Chamberlain cannot be elected at a publick Common Council, which is contrary to the Express Words of the Charter, and so his Election illegal: And the Case of *The King* and *Corporation of Carlisle* was cited. The Corporation of *Carlisle* consist of a Mayor, Aldermen and capital Burgesses, who together make a Common Council; but the Election of

of capital Burgesses and other Officers of the Corporation was vested in the Mayor and Aldermen: A Court of Common Council was held such a Day particularly mentioned, and after the Business of the Corporation was over, the Mayor and Aldermen summoned one *Coulton* to appear, *et sic ut præfertur assemblat'* made an Order to remove him; and upon Motion for a *Mandamus* to restore him, it was held that this Removal was not good: For they ought to have met particularly in that distinct Capacity which was given them by the Charter in this Case, and not to have meddled with this Matter at a Common Council.

In the principal Case, the Court granted the Motion, for it appears from the Books, that this Election was at a Common Council, which is contrary to the Charter.

Inter the Parishes of St. Clement Dane *and* St. Martin in the Fields.

Settlement.

ANN having gained a Settlement in *St. Clement's Dane* by Servitude, married *John Male*, who had no Settlement, and by him had a Son named *Jacob*; after the Death of *John* her first Husband, she married another Man whose Settlement was in *St. Martin's in the Fields*. *Jacob* the Son comes afterwards into the Parish of St. *Giles*, and was removed from thence to St. *Clements Dane*, who appeal to the Sessions, and they ordered him to be sent to St. *Martin's* where *Ann* his Mother

(269.)

Mother was at present settled. Both the Orders being removed by *Certiorari* in *B. R.* The Question was in which Parish *Jacob* was legally settled, whether in St. *Clements Dane*, where his Mother had gained a legal Settlement, in her own Right, or in St. *Martin*'s where she had a Settlement in Right of her Husband only. Serjeant *Corbet* argued, that if the Father's Settlement cannot be found, the Child must be sent to the Place where the Mother's Settlement is, not to her last legal Settlement, but where she is legally settled at that Time; and so it was adjudged *Michaelmas* 1714, *inter* the Parishes of St. *George* and St. *Catherine*. So was the Case of *Paulus Perry* and *Wooden* 1726. There is the same Reason in this Case, for the Woman by her Marriage gains a new Settlement. Serjeant *Baines contra*: The Wife gains no Settlement by Marriage but in Right of her Husband, and it is expresly adjudged in *Salk.* 528, the Case of *Cumner* and *Milton*, where a Widow leaving Children under the Age of seven Years, marries a Man of another Parish, the Children shall go with the Mother for Nurture, but after seven years of age they shall be sent back to the Parish where the father was settled: For she cannot gain a Settlement for them in this last Parish, because under Coverture; and so it is held 2 *Salk.* 482. *p.* 35. both which are Cases in point. The Cases cited on the other Side are not comparable to the present Case. In the Case of *Paulus Perry* and *Wooden*, the Wife removed with her Children, and gained a subsequent Settlement

Settlement in another Parish, but this was in her own Right, and there is no Question but the Children shall have their Settlement in this last Parish, and so was the Case between the Parishes of St. *George* and St. *Catherine*. The Wife rented a Tenement of 10 *l. per Annum*, in the last Parish, and so gained a new Settlement.

The Court gave no Opinion. But *Lee* Justice, said he thought *Jacob*'s legal Settlement was at St. *Clements Dane*, for there his Mother had gained a Settlement in her own Right: And cited the Case of *Wangford*, *Carth.* 449. which is a Case in Point, *Quod vide*, where a Widow gains a subsequent Settlement in her own Right, the Settlement of the Children follow that of the Mother.

Oates *and* Collins.

Promissory Notes.

(270.)

ACTION upon a Promissory Note payable to the Plaintiff or Order for the Sum of 20 *l.* Defendant pleaded *Non Assumpsit*, and gave the Statute of 9th of *Anne* in Evidence, intitled An Act to prevent Gaming; and at the Trial it appeared that this was a Note for 20 *l.* won at a Horse-Race, and whether this was within the Statute was a Point saved to the Defendant by *Raymond* Ch. J. before whom this Action was tried.

Mr. *Fazakerley* for the Defendant: This Case is within the Words of the Act, and therefore good if within the Meaning. Gaming in general is no more than laying Wagers between

tween Man and Man upon any Chance or Hazard relating to Paſtime, or Recreation. Seeing a Horſe-Race, playing at Cards, are Things innocent in themſelves, but lead People into Inconveniencies by laying greater Wagers than they are able to anſwer without injuring themſelves and their Families. This is what was intended by that Statute of Gaming to be prohibited. This therefore is to be conſidered as a beneficial Law, and to be conſtrued in an extenſive Manner. This is intitled An Act for the better preventing exceſſive and deceitful Gaming, and takes Notice that the Laws then in being were inſufficient to prevent the Mischiefs which happen by Gaming, and therefore will not put a ſtricter conſtruction upon this Act of Parliament, than has formerly been done upon other Acts for this Purpoſe, and though Horſe-Racing is not particularly mentioned within this Act of Parliament, yet it falls within the general Words; for after having mentioned ſome particular Games, the Statute goes on and ſays, or other Game or Games whatſoever, and by 16 *Car.* 2. *c.* 7. Horſe-Races are particularly mentioned within that Statute to be Gaming, and therefore both Acts of Parliament are to be conſidered together, as having Reference the one to the other, and therefore it is clear that this falls within the general Words and Intention of the 9 *Ann. c.* 12.

Mr. *Spelman cont'*: It is admitted that Horſe-Races are not expreſly mentioned within 9 *Anne*, but it is ſaid to be included within the general Words, Game or Games, because

because Horse-Racing is taken Notice of as Gaming in former Acts of Parliament, and therefore must have Relation to those Acts: But general Words are not always to be extended in the most absolute Sense. 3 *Lev.* 373. 2 *Rep.* 46. The *Stat.* 13 *Eliz.* where the Words Ecclesiastical Persons do not include Bishops, and yet that was a beneficial Law. So in 2 *Inst.* 408. *Omnes aliæ Aquæ* does not extend to the River *Thames.* 2 *Lev.* 142. (But Note, this last Case was denied to be Law in the Case of *Dalton* and *Stocklane.*) 5 *Mod.* 449. *Salk.* 609. It could not be the Intent of the Act of Parliament to include Horse-Races, for there are several Acts of Parliament made for the Encouragement of breeding Horses.

Page Justice. This is a new Case, and depends upon the Construction of two Acts of Parliament. It seemed to him that this did not come within the Description of Gaming; for every Thing that depends upon Hazard or Chance is not Gaming, for then Policies of Assurance might fall under that Consideration; (271.) supposing a Man has a Brace of Greyhounds and lays a Wager that one runs faster than the other, or that one Man walks to such a Place within such a Time, this cannot properly be called Gaming.

Probyn Justice: This Act is to prevent excessive Gaming under any Shape whatsoever; there is no Distinction between one Sort of Gaming and another, but where a Man ventures a large Sum of Money upon a Hazard or Chance, that is Gaming. This is particularly

larly mentioned within the Statute of *Charles*, and is of the same Consequence with Bowling, Cockfighting, *&c.* and therefore held it to fall within the general Words Game or Games.

Lee Justice: The Statutes of Gaming are Remedial Laws, and to be construed liberally. The Statute of *Car.* expresly mentions Horse-Racing, and it is not to be imagined that because some particular Games are only mentioned in 9 *Anne*, that this Statute intended to exclude all others, and the rather because having made mention of some particular Games, then follows the Words, or any other Game or Games whatsoever: And therefore these two Acts of Parliament must be taken to have Reference the one to the other.

The King *and* Inhabitants of Stroud.

Order of Sessions.

MR. *Yates:* To quash an Order of Sessions, a Servant Maid articled to serve her Master a Quarter of a Year, and if she and her Master then liked one another, then for a Year certain. She served her Master a whole Year without making any new Contract; and the Question was, whether this was a Service for a Year within the Statute, to give the Servant a Settlement at *Stroud.*

The Court held that she had gained a legal Settlement at *Stroud:* For having served a whole Year, the first Agreement shall be construed a Living for a Year subject to a condition: For the Act of Parliament says there must

muſt be a Living and a Service for a Year, and both the Living and the Service need not be upon the ſame Contract, but where the Living for a Year is certain it may relate back to a preceding Service: As if a Perſon is hired for Half a Year, and after that for a whole Year upon a freſh Contract, and ſerves Half of that Year, this is a good Settlement, for the Act of Parliament is complied with. Here is a Living for a Year and a Service for a Year, which is all the Statute requires. *Vid.* 2 *Salk.* 535. *cont':* Two ſeveral Livings for Half a Year, and Service for a Year not ſufficient to gain a Settlement: But in *Hanmore* and *Elkwell*, *Mich.* 4 *G.* 2. It was adjudged, that a Servant hired for Half a Year, and after for a whole Year, he ſerved the Half Year, and eight Months of the whole Year, a good Settlement.

(272.) The King *and* Taylor.

Information. TO ſet aſide a Judgment of *Ouſter* upon an Information in Nature of a *Quo Warranto*, for uſurping the Office of capital Burgeſs from 20th of *Auguſt*, 1732, to the Time of filing the Information. Defendant in his Plea admitted Uſurpation from 20th *Auguſt* 1732, to 29th *Sept.* following. He was elected and ſworn in a capital Burgeſs: And upon this Confeſſion Judgment of *Ouſter* was entred generally for the whole Time laid in the Information. The Queſtion was whether the Judgment ſhould stand as it was entred generally,

generally, or should be entred specially for so long only as the Usurpation continued.

Serjeant *Chappell*, *Hussey*, &c. Argued no other Judgment could be entred except a *Capiatur pro fine*, as is usual in all Cases; and as the King was intitled at all Events to a Judgment, it could be enter'd no Ways than this was. *Co. Ent. Quo Warranto*, 27, 28, 29. *Quo Warranto* is a Prosecution in the Nature of a real Action, that is, to punish the Person and recover the Thing, and from these concludes that there must be two Judgments, *scil. a Capiatur pro fine* and Judgment of *Ouster*; for here can be no Judgment *recipere in Manus Domini* because no Occupation. *Fleta Lib.* 5. *c.* 9. *Co. Ent. Quo Warranto* 535, 559. Said that the subsequent Election could not be valid till Satisfacton was made for the Usurpation. *Co.* He compares a *Quo Warranto* to a Writ of Right, and Judgment in that is to hold to him and his Heirs for ever, and therefore Judgment in *Quo Warranto* ought to be so too, and then 9 *Anne*, *c.* 10. *Sect.* 7. Where Sheriff usurps, there shall be a Judgment of *Ouster* and Punishment likewise. *Vide Rastal's Entries Quo Warranto*, where Lord of a Manor prescribed to hold a Court Leet, the Attorney General replied, that he had no Pillory or Tumbrel, and the Judgment in that Case was, that the Leet should be seised into the King's Hands, and the Lord fined, but the Lord prays to submit to a Fine, and so had the Leet restored, and from thence argued, that Judgment of *Ouster* as it was entred generally should stand,

 and

and upon the Defendant's submitting to a Fine he should be restored.

Mr. *Kettleby* on the same Side, cited the Case of the *King* and *Pindar* [2 Ld. Raym. 1447], 10 *G.* 1. *B. R.* and after carried into the House of Lords. The Case was this, *Pindar* was elected Mayor of *Bodmin* in *Cornwall*, but was never sworn in, notwithstanding which he acted as compleat Mayor; and this was held Usurpation for the whole Time, and Judgment of *Ouster* was entred generally; and the Question in the House of Lords had no Relation in this Case to the Judgment, but whether Error might be brought upon the Refusal of a *Mandamus*, which Point was carried in the Negative. In the Case of the *King* and *Hicks*, Judgment was never given, but concluded by Compromise. There is not one Instance of a Judgment in *Quo Warranto* being entred specially; in a *Quo Warranto*, Judgment against the Party is final, but not against the King. He observed upon the 9th *Anne*, that it did not extend to Offices determinable upon Years; where any Part is found for the Crown, the Crown must have Judgment. That the Word shall, in this Act of Parliament is compulsory. In the Case of the *King* and *Hicks*, there appeared no Continuance of an Usurpation: It was only said *Usurpavit* and *non adhuc Usurpat*, where an Office is regranted, it enures by Way of Pardon and purges the Offence. But where there is a Continuance charged in the Usurpation, *Ouster* is an essential Part of the Judgment. *Salk.* 511.

(273.)

511. *Show. Par. Cases, Haly's Case.** *Comberb.* 277.

Cur. The Judgment ought not to be entred generally, for the Confession is only to a Time past, and does not extend to the present Execution of the Office. In all Cases where Judgment is enter'd generally, it must be *Secundum subjectam materiam.*

Keble *and* Hickeringell, determined in B. R. Mich. 6 Ann.

Decoys.

THE Plaintiff declares that such a Day he was lawfully possessed of a Close, *et de quodam Vivario vocat'* a Decoy-Pond, and that the Plaintiff at his own Costs and Charges had procured and maintained divers Nets and Decoy Ducks there, and made Profit thereof, and that there was a great Resort of Fowl thither, that the Defendant having and maliciously intending to damnify the Plaintiff and to frighten and drive away the Wild Ducks, and to deprive him of the Profit of his Decoy Pond, did such a Day, *&c.* come to the Pond Head, and shoot so many Times in Guns *ad et erga* the Pond, and thereby frightened away the Wild Ducks and Wild Fowl, whereby the Plaintiff lost great Benefit which otherwise he might have made of the Decoy Ponds, to his Damage 50 *l.* Upon Not guilty pleaded, there was a Verdict for the Plaintiff and 20 *l.* Damages found. Upon Motion in Arrest of Judgment, it was much debated whether

* This case cannot be found, but see *King* v. *Corp. of London*, 1 *Show.* K. B. 263 and 274.

an Action on the Case would lye against a Man for coming upon his own or another Man's Ground, and frightening the Wild Fowl in the Manner as laid in the Declaration. For it was agreed, that if it had been upon the Plaintiff's own Ground Trespass would lie. After several Arguments at the Bar,

Holt Ch. J. delivered the Opinion of the Court, that Judgment out to be given for the Plaintiff. He said this Action is altogether new, but yet they think it supported by the antient Reason and Principles of Law: For the Plaintiff being possessed of the Decoy Pond, and having Ducks and Engines there, it is not only lawful for the Plaintiff but advantageous to him to make Use of them, and it is a Trade and Employment used by him in his own Freehold, and it is lawful for every Man to make the best Advantage of his own Land: There is the same Reason for this Action, as for any Tradesman whatsoever to have an Action against another that damnifies him in his Trade: What is the Reason that Action lies for Words whereby a Man may be damnified in his Trade (and not only for Words that accuse him of a Crime); as to say of a Merchant he is likely to break, *&c.* This is a malicious Act purely to do the Plaintiff a Mischief without any Motive of Profit or Pleasure to himself. A Man indeed may have Damage done him for which no Action will lie; as in 11 *H.* 4. 47. A Grammar School-Master brought an Action against another for setting up a School near him; and

(874.)

and it was held an Action would not lie, for it was *damnum sine injuriâ:* But supposing one shoots to frighten away Children coming to School, I make no Question but in that Case an Action would lie. There is a Case very like this in 29 *Ed.* 3. 18. Where the Owner of a Fair brings an Action for hindering People coming to the Fair, whereby he lost his Toll and Profit of the Fair, and yet perhaps the Goods they would have brought might not have been sold there: An Action on the Case lies against one that by Threats frightens away his Tenants at Will; and so in 21 *H.* 6. 31. It has been objected the Declaration does not set forth the Number of the Wild Fowl or the Nature of them: But it is impossible to shew that; and this is not like *Playter*'s Case [5 Rep. 34*b*.]; besides the Plaintiff does not bring his Action for the Property he had in the Wild Fowl (for he had no Property) but for frightning and hindring great Numbers from coming to his Decoy Pond. 2 *Cro.* 123. The Case of *Dent* and *Oliver*, which was an Action for assaulting the Plaintiff's Servant, and disturbing him from gathering the Plaintiff's Toll. It was moved in arrest of Judgment, that the Declaration did not say *Per Quod servitium amisit*, but overruled because the Action was not brought merely for the Assault, but for hindring the collecting of the Toll: And this Case, without setting out the Number and Nature of the Wild Fowl, is as certain as that. *Owen* 109. Action for hindring him to take Toll of divers Pieces of Wool: Exception was taken that it was not shewn

ſhewn what the Toll was, nor how many Pieces of Wool, and yet held good, becauſe the Foundation of the Action is the Diſturbance. *Vid.* 2 *Cro.* 605. *Dawney* and *Dee*'s Caſe, and 9 *Rep.* 50. Lord *Salop*'s Caſe. It is objected that the Word Wild Fowl is uncertain, for all Birds whatſoever are ſo: But it is certain what Wild Fowl are, and is ſhewn by 25 *H.* 8. 11. And the Latin Word in this Declaration is a very proper Word, *Fluminiæ Volucres*, and is made Uſe of in *Littleton*'s Dictionary. It is likewiſe objected that *Vivarium* is too general a Word to ſignify a Decoy Pond: But it is a very proper Word by Reaſon of the Wild Fowl that reſort there.

(275.)

Powel J. ſaid, He thought Decoy Ponds were new Things, but ſince they are become ſo valuable a Property they ought to be preſerved. *Holt* Ch. J. ſaid, that if a Man accept the Grant of a Market, Fair, *&c.* And another Man the next Day gets another Grant of the like to the Prejudice of the firſt Grantee, the Action on the Caſe will lie for the Damage, and the Reaſon is, becauſe the Publick have a Property in it, and the Man that accepts the Grant is indictable if he does not keep it up.

The King *and* the Biſhop of Landaff, &c. Hil. 7 G. 2.

Error in Quare Impedit.

ERROR upon a Judgment in *Quare Impedit* at the Grand Seſſions in *Wales*. *Quare Impedit* recites the 25 *H.* 8. *c.* 21. and particularly what was enacted in the 3d and ſo

so on to the 8th Section, and refers generally to the Statute. The Writ then sets out that Queen *Anne* was seised of the Advowson of Saint *Andrew's in Gross per se de Feodo*, and being so seised *John Tyler*, Doctor of Divinity, was elected Bishop of *Landaff*, and afterwards 24th of *June* 1706 (*Ecclesia illa vacante*) the Archbishop granted Letters of Dispensation *Secundum formam Stat. &c.* and reciting the Bishop of *Landaff*'s Petition, and that the Queen also gave him the Deanery of *Hertford retinere, gaudere et habere, et in Commendam tenere prout per literas Dispensation' plenius liquet et apparet.* 25th of *June* the Letters of Dispensation were confirmed under the Great Seal, by Virtue whereof Dr. *Tyler* becomes intitled, *&c. et fuit Capax retinere prædict' Rectoriam Ecclesiæ sci' Andreæ prædict' in Commendam cum Episcopatu Landaven'.* 25th of *July*, 5 *Annæ*, Dr. *Tyler* being then Parson of St. *Andrew*'s was created Bishop of *Landaff*, and by Virtue of said Letters of *Commendam* retained said Church for his Life. *1st August* 1714 Queen *Anne* died seised of the said Advowson, *&c.* and *George* the First became thereof seised *ut de uno Grosso in Jure Coronæ*, and the Church becoming void by the Death of the said Bishop, it belonged to the late King to present, who 11th *June* 1727 died seised, *&c.* and it belongs to the now King to present, but he is hindred by Defendants. The Bishop pleads that he claims nothing but as Ordinary. Lord *Brooke* one of the other Defendants pleads in Bar, that his Father was seised of the Manor of *D. P.* whereunto a Moiety

Moiety of the said Advowson, *i. e.* every other Turn belonged to him, and being so seised, and the Church becoming vacant by the (276.) Death of the Incumbent, it belonged to his said Father to present, and he presented the Defendant *Humphreys* who was admitted, instituted, and inducted, and traverses Seisin in the Queen to the Advowson, *&c.* The other Defendant *Humphreys* pleads to the same Effect; and to this Plaintiff replies that the Queen, *&c.* was seised of the Advowson, *&c. in Gross per se ut de Feodo prout Nar' supponitur*, and concludes to the Country. Issue is joined upon this, and Verdict for Plaintiff.

Mr. *Strange*, for the Plaintiff in Error insisted upon four Points. First, That in *Quare Impedits*, it is not sufficient to alledge Seisin only, but Plaintiff must likewise aver a Presentation in himself, or in those under whom he claims; and this Rule extends to all Cases, as well when the Crown is concerned, as in the Case of a Subject, and though there may be shewn Cases to the contrary, yet those Cases are particular, and the Reason for not alledging Presentation specially shewn. 2dly, This is not a *Commendam accipere*, but a *Commendam retinere*. 3rdly, Though a *Commendam accipere* does amount to a Presentation, yet a *Commendam retinere* does not. 4thly, If the Court should be of Opinion, that this is a *Commendam capere*, yet it will not aid the Defect in *Quare Impedit*, because as it is here pleaded, it is a void *Commendam*, and not within the 25th of *Henry* the 8th. As to the first Point he argued, the alledging Seisin only without

without ſhewing a Preſentation is not ſufficient except in ſpecial Caſes, as in *Fitz. N. B.* 33. and under the ſubſequent Letters *J.* and *K.* A Man by the King's Licence makes a parochial Church, which ſhall be preſentable; he may have a *Quare Impedit* without alledging any Preſentation, and ſhall count upon the ſpecial Matter. So in the Caſe of a Lapſe or Donative, Patron may have a *Quare Impedit* without ſhewing a Preſentation: But generally ſpeaking, a Preſentation is neceſſary, for that is a poſſeſſory Action, and the Preſentation is the Poſſeſſion. *Cro. E.* 518. 5 *Rep.* 97. *Vaugh.* 57. And the Law in this is the ſame in Caſe of the King, with a Common Perſon. 2 *Roll. Abr.* 378. *Vaugh.* 53, 56, 57. And ſo are all the Books and Precedents in the Books of Entries. 2 *Roll. Abr.* 378. *p.* 6. *Skinner* 651. *Co. Ent.* 403. *a.* 404. *a.* 509. *a.* 514. 515, 520. *Raſt. Ent.* 505. *a.* 529. *a. b.* 530. *Lutw.* 1078, 1083, 1086, 1090. *Lev. Ent.* 184. 14 *H.* 4. 36. *b.* That this is a *Commendam retinere* is clear upon the Face of the Pleading, and from the expreſs Words, for the Words are, *retinere, gaudere et habere*, and a Man cannot retain what was not in his Poſſeſſion before, and therefore my Lord *Hob.* ſays, that what is generally called a *Commendam retinere*, is indeed no *Commendam*, but is only a Faculty of Retention, and Continuation of the Benefit in the ſame Perſon and Eſtate wherein it was: So a *Commendam* it is not, for my own Benefice cannot be commended unto me. *Hob.* 143, 156. 4 *Rep.* 79. *b.* in *Digby*'s Caſe, this

(277.) this Distinction taken and held good in Law. And this is the Reason that a *Commendam retinere* cannot amount to a Presentation, for the Church being then full, there can be no Presentation: But in Case of a *Commendam Capere* it is otherwise, for there is no Difference between such a *Commendam* and a Presentation, but that the one presents the Parson to the Church, and the other commits the Church to the Parson. *Hob.* 150. The fourth and Principal Point was, that neither the *Commendam* nor finding of the Jury, that the Queen was seised in Fee *Jure Coronæ*, can cure the Defect in *Quare Impedit*. As to the *Commendam*, though there is a Latitude of Discretion left in the Archbishop, yet he has not an absolute, indefinitive Discretion, but is circumscribed by certain Rules. For the *Stat.* 1. 3. gives the Archbishop the Examination of the Causes and Qualities of the Persons, and therefore if he affirms the Cause just, or the Quality of the Person worthy, there can be no Objection to the Dispensation: But this Point is very imperfect in the Dean, for here is no Averment that the Bishoprick was insufficient, but that the Bishop's Petition did so inform. *Hob.* 158. As to the other Matter, that the *Quare Impedit* was not cured by Verdict, he said it was not necessary for Plaintiff to prove more than his Declaration, and that he might do, without giving Presentation in Evidence; for if he proves Seisin, that is sufficient to support what is alledged in Declaration, and the Court cannot intend that more was proved at the Trial.

2 *Salk.*

2 *Salk.* 662. *Buxendin* v. *Sharp.* Plaintiff declared, that Defendant kept a Bull that used to run at Men, but did not say *Sciens* or *Scienter*, *&c.* This was held nought after Verdict: for the Action lies not unless the Master knows of this Quality, and we cannot intend it was proved at the Trial, for Plaintiff need prove no more than is laid in his Declaration, and so it was held *Hil.* 12 *W.* 3. The Court goes in Presumption of Evidence necessary to support the Court only. *Cro. Jac.* 46. *Burser* and *Martin.* Trespass *Quare Equum cepit a persona*, and it was objected in Arrest of Judgment that Declaration was ill, because not alledged to be *Equum suum*, or that he was taken from the Plaintiff's Possession, and the Declaration cannot be aided by Intendment, but ought to be certain, and so it is in 1 *Sid.* 184. Trespass for taking Goods, the Declaration is not good without saying they were in Possession of Plaintiff. So was the Case of *Dell* and *Newton.* *Hil.* 10 *Ann.* Trespass *quare duo plaustra cepit*, and held bad, because no Possession alledged.

Draper cont': Quare Impedit is not a mere Possessory Action only, but in some Cases differs and falls under the same Consideration with a Writ of Right, and so it is said in the Case of *Digby* and *Fitzherbert.* *Quare Impedit* alledges Seisin in the Queen, that she was seised *Jure Coronæ*, and upon that Issue is joined, and the Jury have found that she was so seised. In Actions possessory Seisin must (278.) be alledged, but not necessary to shew how seised. As in Trespass, *Quare Clausum suum fregit*,

fregit, Plaintiff never shews in what Manner he was seised, though Presentment is necessary to be shewn in the Case of a Common Person, it is not so in the Case of the King, and therefore in a Writ of Right of Advowson brought by the King, the Tenant shall not tender the Half Mark, because *Nullum Tempus occurrit Regi*, and therefore the King shall alledge that he or his Progenitors were seised without shewing any Time. 1 *Inst.* 294. *b.* But a Presentment before Time of Memory is not sufficient, for it is not triable. 2 *Roll. Abr.* 379. *Cl. Law* 446. Here is Seisin positively alledged, and Seisin and Possession is the same Thing. 1 *Inst.* 153. 6 *Rep.* 57. This is a *Commendam capere*, and not a *Commendam retinere*, for it is expresly averred that the Church was then void, (*Ecclesia illa tunc Vacante*) the Words of the *Commendam* are, *dedit et concessit tenere*, which are Words of Grant, and then follows, *pro et durante vita ipsius Johannis, &c. et quamdiu* he shall remain Bishop, so that this Condition has all the Properties of a *Commendam capere*; for Grant to a Man so long as he continues Bishop, *&c.* is a Grant for Life, as in 1 *Inst.* Grant to a Woman *durante Viduitate* or *dum Sola* is a Grant for Life. *Gib. Co.* 956. As to the last Point, he said this Defect was now cured by Verdict; for Jury have found that the Queen was seised *Jure Coronæ*, and if Presentment be necessary to support this Action, the Court will intend it to have been given in Evidence, or otherwise the Plaintiff could not have a Verdict. *Mich.* 4 *G.* 1. *Nutteril's* Case, Trespass for disturbing Plaintiff in

in his Right of Burial, and declares that he was seised of an antient Messuage, and by Virtue thereof prescribes to a Right of Burial. Defendant pleads he was Vicar, and obliged to repair the Chancel, and traverses the Prescription; and after Verdict it was objected in Arrest of Judgment, that it was not alledged to be in Consequence of Repairs, *&c.* But it was answered that this was aided by the Verdict, for the Court would intend it necessary to be given in Evidence.

Strange by Way of Reply. It is insisted upon that this is a *Commendam capere*, because at Time of granting the Presentation the Church is said to be void: It is indeed said so, but it appears clearly through the whole Record that the Case was otherwise, and these Words thrown in so loosely is no sufficient Averment to the contrary. The Word *Retinere* implies a Faculty of Retention and Continuation in the same Person, and the Word *tenere* following, does not alter the Case. It is no more than if it had been expresly said, you shall retain and hold for so long Time. Lord *Hob.* says, that a *Commendam capere* must be for Life; this is not so, but only so long as he continues Bishop. It is certain that the Statute of Limitations does not extend to the Crown; but that is not the Question, but whether the Crown must (279.) not conform to Rules of Pleading. Where Seisin and Possession express the same Thing, as in 1 *Inst.* 153, Pleading is good, whether alledged by the one or the other; but that does not prove where the Difference is so material,

material, that pleading the one will satisfy the other. Though Presentment might be given in Evidence in this Case, yet not necessary to support the Facts laid in the Declaration: And in all Cases where the Declaration is cured by Verdict, it is where the implied Evidence was necessary to support the Declaration: But in this Case, Seisin might have been proved, which proves the Declaration without giving a Presentation in Evidence.

Y. C. J. This is a Possessory Action, and therefore the Plaintiff must shew a Possession: But in *Quare Impedit*, there is no Way of doing this except by alledging Presentation in the Plaintiff. There are two Questions to be made upon this Point, 1st, Whether there is any Thing appearing upon the Face of the Record to shew a Presentation in the Crown. 2dly, If any Thing is alledged in excuse of this Defect. As to the first it has been insisted upon, that this amounts to a *Commendam capere:* But I do not find there has been any Thing said to prove this Assertion. The Words in the *Commendam retinere, habere, &c.* which proves the Church to be full at that Time; for otherwise a Man cannot be said to retain what was not before in his Possession. It has been said, that this is a *Commendam capere*, or else the *Commendam* is void; if so, it then stands upon the same Foundation with *Quare Impedit*, where there is no Recital of any *Commendam*, and in that Case a Presentation is necessary. But the chief and principal Point is, whether this Defect is cured by Verdict, and as to this Point, there are two Ways of

of curing Defects in Pleading by the Verdict: The one Artificial, the other Natural; the first is where Defects in Pleading are cured by Act of Parliament, as the Statute of *Jeofails*; and this I call Artificial, because neither the Finding in itself, nor any Thing thereupon implied in Law could have aided in these Cases, without having Recourse to the Act of Parliament. The other, which is the natural Way, is something implied in Law necessary to have been given in Evidence, to induce the Jury to bring in their Verdict: And this is in Cases, where without such an Implication the Facts laid in the Declaration could not be sufficiently proved. But how does this appear to be the present Case? If Seisin could not be found without giving in Evidence a Presentation, there is no Question but this Declaration is cured. But Seisin may be proved without proving a Presentation, and that is proved by the Cases cited, or otherwise it could not be necessary to be alledged in pleading, And it is very true what has been said by Mr. *Strange*, that if Seisin can be proved any other Way than by proving a Presentation, the Court will not intend any particular Way. *N.B.* This Case was again argued, and Judgment for the King.

Rekhead *v.* Catchcart. (280.)

Covenant.

REKHEAD brought Covenant upon Charter-Parties, against Defendant *Catchcart*, who pleaded that it was not the Deed

Deed of *Catchcart* and *Blackwood*, but of *Catchcart* only, and that the Covenants in the Charter-Parties were not separate but joint between *Blackwood* and *Catchcart*.

Mr. *Filmer* moved to set this aside for a Sham Plea with Costs, for Plaintiff cannot go to Issue upon it, because the Deed is only executed by *Catchcart*, and therefore if we should join Issue upon this Plea there must be a Verdict against us.

Mr. *Draper cont'*: The Covenants in the Charter-Parties are joint between *B.* and *C.* but the Execution of the Deed is by *C.* only, and cited a Case in 2 *Lev.* [118].

Cur': If the Deed is executed by *C.* only, it is his Deed only, and the Action lies against him only, and therefore set aside the Plea with Costs.

The King *and* Company of Gunmakers.

Mandamus.

MANDAMUS to admit *J. S.* to his Freedom of the Gunmakers Company, having been educated in the Art and Mystery of a Gunsmith, and served seven Years Apprenticeship. The Company returned they were incorporated by Charter, by *Char.* 1. and set out the Charter that no Person was intitled to his Freedom but those of the Trade residing in *London*, or within ten Miles thereof at Time of the Incorporation, and such of their Children as should serve sen Years Apprenticeship to that Art and Mystery; and as to

to other Persons it left the Company at large to admit or reject as they thought proper and convenient, and they returned that they did not think proper to admit him. Objection was taken to the Return, that it did not answer the Suggestion, as to his being educated in the Art, *&c.* and serving seven Years Apprenticeship.

Cur': Not necessary; they have returned the Charter, and shew that he is not intitled, which is sufficient.

The King *v.* Grosvenor et al'.

Information.

INFORMATION in Nature of a *Quo Warranto* to shew by what Authority Sir *Robert Grosvenor* and Mr. *W. W. Wynne*, and several other acted as Aldermen of the Corporation of *Chester*. Upon shewing Cause Defendants produced a Charter, under the Great Seal, tested 37 *Car.* 2. which vests the Election, *&c.* in the Mayor, Aldermen, and Common Council. The Prosecutors in answer produced another Charter granted 4 *Jac.* 2. Reciting the Petition of the said Corporation to be restored, and a Regrant of their Liberties and Franchises granted by 16 *Car.* 2. but took no Notice of that of the 37th, and denied Acceptance of this last Charter. As Evidence of Acceptance, it was insisted upon, that the 37th of *Car.* 2. appointed certain Officers called Leave Lookers, not mentioned in any previous Charter, and that in Pursuance of this Charter such Officers had

(281.)

 been

been elected. That by the Charter certain Hospital Lands were granted to the Corporation, and that the Corporation was now in Enjoyment thereof: That this Method of Election had been established by constant Usage for sixty Years and upwards, before the Charter, and that the Body in general had from Time to Time acquiesced under such Elections: There was likewise a By-Law produced in Confirmation of this, but not insisted upon as conclusive Evidence. There was an Objection taken by the Prosecutors to the Qualification of Sir *R. G.* and Mr. *W. W. Wynne*, that they were not Inhabitants, *&c.*

Yorke, Ch. J. The Charter does not make it a necessary Qualification that the elected should be Inhabitants, but leaves the Election at large. The Word which is made Use of in the Charter is *Concives*, which imports no more than Fellow Citizens. The single Question is, whether the Defendants have produced sufficient Evidence of Acceptance to induce the Court to refuse granting an Information. Informations in Nature of *Quo Warranto's* is a Remedy given by Law at the Discretion of the Court, to try the Right in these Cases between the Parties, and there is no other Remedy. The Evidence therefore upon which Informations are denied ought to be very clear and strong; for by Refusal we conclude the Right of the Corporation. The Evidence that has been insisted upon in Proof of Acceptance of the Charter 37 *Car.* 2. is the Appointment of Leave Lookers; but this

this is not sufficient Evidence of Acceptance by the whole Body; for how are the Leave Lookers appointed? Not by the Mayor and Commonalty in general, but by a select Number, *viz.* The Mayor, Aldermen, and Common Council, and Evidence of Acceptance to bind the whole Corporation, must be an Acceptance by the whole Body in general; and this Rule does not impeach what is laid down in the Case of Corporations reported by *Coke*; and likewise in *Jenkins's Centuries:* For in that Case the select Number of the Electors was appointed by the Body in general. But in the present Case what is there to prove Acceptance by the Commonalty? The Grant of the Hospital Lands is not sufficient, for the Corporation might have enjoyed those Lands (282.) before the Charter was granted; and the mentioning them again might only be by Way of Confirmation or Regrant: If it be otherwise it is proper to come from the Defendants. As to the Usage insisted upon, that does not seem to be of such long Continuance as to prevail against the express Words of a Charter. The Case of the Corporation of *Brecknock* (in which he said he was Counsel) is much stronger. For there was Proof of Usage so long as from the 15th *Eliz.* But that Usage, being contrary to the express Words of the Charter, the Court would not admit of; and upon this Error was brought in the House of Lords, and the Judgment of this Court was affirmed. The Defendants were certainly right, not to insist upon the By-Law: For if they had, an Information

must have gone upon that Point only: But it was only produced as Evidence of Acceptance: But how is this proved by the By-Law? There is no Reference in it to the Charter, nor is the Charter so made as once mentioned. On the contrary, it seems an Evidence against the Charter; and the rather, because it was confirmed afterwards by the Commonalty, which had been needless, if the Charter had ever been accepted. *Page*, *Probyn*, and *Lee*, Justices to the same Effect, and Information was denied.

The King *v.* Corporation of Shrewsbury.

Mandamus.

MANDAMUS to restore *Corbet Kynaston*, Esq; to the Office of Alderman. The Corporation returned, that by the Charter the Aldermen were obliged to Residence either by themselves or Families, except in the Time of Plague or other contagious Distemper, and alledged that *C. K.* Esq; was not resident either by himself or Family for the Space of three Years last past, and that thereupon he was lawfully removed by the Mayor and Majority of Aldermen duly assembled; and averred that neither the Plague or other contagious Distemper raged within the Town or the Precincts during that Time.

Strange took several Exceptions to the Return: And first as to the Merits, he said this was a general Exception in the Charter, and not confined to the Town or Suburbs, nor can

can this be intended the Meaning of the Charter, that a Man ſhould continue Reſident, till the Plague, *&c.* was actually within the Suburbs, and therefore the averring it not to be within the Town and Precincts is not ſufficient. The next Exception was in point of Form, that this did not appear ſuch an Aſſembly as was intitled to remove. It is only ſaid by the Mayor and Aldermen duly aſſembled; but no Averment that Notice was given of their Aſſembling for this particular Purpoſe, nor that it was a Charter-Day; though that had not been ſufficient; for it has been held, where the Meeting is of a Charter-Day, and any particular Act is to be done *extra* the general Buſineſs of the Corporation, a Summons of the whole Body is neceſſary. *Hil.* 1 *G.* 1. The *King* and *Strangeways*; and this cannot be intended from any Thing appearing upon the Face of the Return. The Words of the Return, that he was removed by the Mayor, *&c.* duly aſſembled makes no Difference: For whether duly aſſembled or not is Matter of Law, and the particular Manner ought to have been ſhewn, that the Court might judge whether this was ſuch an Aſſembly as had legal Power to remove: As in Convictions upon the Game Act, where the Words are general, (*the Defendant was convicted according to Law not being duly qualified*) has been held naught; for the particular Circumſtances of his Diſqualifications ought to have been ſhewn. He further objected, that as there was no Summons of the whole Body, ſo neither was there Notice (283.)

Notice given to the Defendant: And to remove a Man from his Freehold without Notice is contrary to natural Justice. In Case of Attainder, a particular Time is fixed for the Party to come in, before the Attainder goes; and this is always held sufficient Notice; and so in Outlawries, Writ of Proclamation issues to the Sheriff, which the Law looks upon as sufficient Notice. Supposing a Man is serving his King and Country in a publick Employ as Member of Parliament, *&c.* or in case of Sickness, these are sufficient Excuses to dispense with his Residence: Besides by the Charter, personal Residence is not necessary, for if his Family resides there it is sufficient; and it does not appear but that his Family was Resident. It has always been held, that Summons or Appearance of the Party: But a Summons without Appearance, or Appearance *sans* Summons, is sufficient: And so was Doctor *Bentley*'s Case [Fortes. 202: For there was neither Summons by the Convocation, nor Appearance on the Doctor's Part, and therefore the Order of Convocation was held naught. And so it is held in Serjeant *Whitacre*'s Case, 2 *Salk.* 435. Want of Notice is cured by Appearance.

Yorke, Ch. J. The Objections that have been taken depend upon the Construction of the Words of the Charter, whether the Restriction to Residence (except in the Time of the Plague, *&c.*) can be dispensed with, because the Plague is at that Time in some other Part of the Kingdom. The Charter must have a reasonable Construction put upon it, and

and such a one as will make it consistent with itself, and therefore the Exception must be confined to the Town and Suburbs, or otherwise the Restriction in general would be defeated, and the rather, because of the Words (or any other contagious Distemper) which at some Time or other prevails. As for instance the Small-Pox is raging in some Part of the Kingdom. The Objections that are made in Point of Form are, that it does not appear there was a Summons or Notice given to the Defendant: There was no Necessity for either in this Case, for it is expresly alledged, that Mr. *Kynaston* was neither Resident by himself or Family at any Time during the Space of 3 Years: And it has been often resolved, that Summons or other Notice is not to be served out of the Suburbs of the Corporation: If such a suggestion was necessary, it must have been so in Serjeant *Glide's* Case [i.e. *Rex* v. *Corp. of Exeter*], 1 *Show.* 364. But this was made no Objection in that Case. The next Exception is, that this does not appear to be a proper Assembly. By the Charter the Power of Removal is vested in the Mayor, Aldermen and Assistants; and in the Return, the Non-Residence of the Defendant is alledged, and that the Mayor and major Part, *&c.* duly assembled then and there did remove, *&c.* It has been rightly insisted upon, that this could not be a legal Assembly unless Summons; but the Question is, whether a Summons is necessary to be alledged in the Return; in Pleading it is not necessary, but might be given

(284.)

given in Evidence at the Trial. The Difficulty that remains with me is, whether there is not a Defect in the Description of the Assembly. It is said to be an Assembly of the Mayor and major Part only, *&c.* whereas the Power of Removal is vested in the Mayor, Aldermen and Assistants; and the Assembly ought to consist of the Whole, and not of the major Part only. Suppose this had been in Case of a Return to an Information in Nature of a *Quo Warranto*, would it be sufficient to say that at an Assembly of Mayor and major Part, *&c.* duly assembled he was elected, *&c.* As to Dr. *Bentley*'s Case, it appeared by the Return that he was Resident, and therefore the University ought to have shewn a Summons, or an Appearance by the Doctor, to excuse the want of a Summons. *Page* and *Probyn* Just. to the same Effect. And *Lee* J. agreed that the Return was sufficient in Regard to the Merits or Warrant of alledging Summons; for it appears he was Non-Resident the whole Time: Sickness may be alledged in excuse, but that is proper to come on the Part of the Defendant: As to what is objected against the Legality of the Assembly, he thought the Return sufficient; for it is said to be by the Mayor, *&c.* duly assembled; and we cannot by Inference intend it an illegal Assembly in order to vitiate the Return to a *Mandamus*. The Removal appears to be by the Mayor and major Part, *&c.* which is an Averment sufficient to refuse a peremptory *Mandamus*. Therefore this last Point was reserved to be spoke to again.

The

(285.)

Conviction.

The King *v.* Fuller.

CONVICTION for selling distilled Liquors *sans* Licence. Two Objections were taken, That the Conviction was in the præterimperfect Tense, *viz.* That he has been convicted, and has forfeited, *&c.* The next Objection was, that there was no Distribution made of the Penalty. In Answer to this last Objection, were cited the Case of *The King* and *Minton*, *Mich.* 3 *G.* 1. and *The King* and *Chandler*, both Convictions for Deer-stealing; where it was held that *Ideo convictus est* was sufficient without distributing the Penalty. In the present Case, the Court was strong of Opinion to the contrary; and said, that in the Case of *The King* and *Haws* it was adjudged that the Penalty must be distributed. And therefore the Conviction was quashed without Argument upon both Points.

The King *and* Floyd, Clerk of the Peace pro Com' Cardigan. Mich. 7 Geo. 2.

THE Quarter-Sessions removed Defendant from his Office upon Examination and a full Proof made of his taking several Sums of Money extorsively in the Execution of his Office. The Order of Removal being return'd by *Certiorari*.

Fazakerly

Fazakerly took several Exceptions; and 1st he said, this being in Nature of Conviction, the Evidence upon which he was convicted ought to have been set out upon Record: But here it is only said upon Examination and full Proof, which is not sufficient; for the Court cannot judge whether the Evidence was sufficient Foundation for Conviction. In all summary Convictions the Evidence must appear to this Purpose: Here is a Conviction, but the Defendant must be found Guilty of the Misdemeanors he is charged with before the Sessions can remove him. This is a Power given by 1 *W. & M.* 21. 6 & 7. And the Punishment runs extremely high, it is no less than a Deprivation of his Freehold. And this is the rather to be considered as a Conviction, because this is a Power which cannot be traversed, and by the Act of Parliament must be upon full Proof: But how must the Court judge in this Case unless the Evidence appears upon Record. Another Objection is, That the Charge against the Defendant is for extorsively taking Fees *colore Officii ad general' Quar' Session' pacis tent' coram Justiciariis* (*quorum unus*) but does not name the Justices, nor the Time
(286.) when the Sessions was held. If an Indictment or Order to be returned into this Court, such a general Description as this would be insufficient; and so it was held in the Case of *The King* and *Harland*; the Indictment was quashed because the Justices were not particularly named, but the Caption was as here, *coram Justiciariis* generally. The Quarter-Sessions

Seſſions is no Court of itſelf but from Juſtices ſitting there.

Draper cont': All Convictions ariſe upon penal Statutes where the Informer is to have a Benefit; and therefore Evidence muſt appear upon Conviction, that this Court may judge upon it whether ſufficient to give a Juriſdiction. This is a Proceeding at Quarter-Seſſions, which is a Superior Court of Record; and the Evidence which is the Foundation of their Judgment is never recorded. It is not ſaid by the Act that either the Examination or Proof ſhall be reduced into Writing: It is only ſaid that the Examination muſt be in open Court, which is always *vivâ voce.* It is objected, that it does not appear when the Quarter-Seſſions was held.—Not neceſſary.—The Removal is for extorſively taking Money, and whether in Seſſions or out of Seſſions, not material.

Fazakerly: If this is looked upon as a Conviction, whether that Conviction be at the Seſſions or out of Seſſions is not material: A Conviction before two Juſtices only, is equally a Conviction in Court of Record as in open Seſſions: In many Caſes they have a final Juriſdiction, and are the dernier Court of Record, from whence no Appeal lies.

Yorke C. J. It has always been held in this Court, that in all Caſes of ſummary Convictions, the Subſtance of the Evidence muſt be ſet forth; and ſo it was held, *Paſch.* 13 *Ann.* *Queen* and *Brown*, *Queen* and *Gray*, *Queen* and *Handall*, where it was only ſaid, *Sacramentum præſtat corporale de veritate, &c.* which was

was insufficient. And in Case of *Queen* and *Green*, *Hil.* 12 *Ann.* it was held the Conviction must not only appear to be upon Oath, but must go further and shew upon whose Oath the Conviction was, *& quod jurat & deponit quod*, *&c.* The Question is, whether this Case can be materially distinguished, whether a Conviction at Sessions, differing from summary Convictions before private Justices. If this Case was left to ordinary Way of Proceeding at Sessions, it ought to have been by Jury. But the regular Method of Proceeding in these Cases is in a summary Way, and whether by two or more Justices makes no Difference. It is said the Conviction was upon Examination and full Proof, which are the Words of the Act of Parliament; but it is not said this Proof was upon Oath.

Lee J. The Question in this Case is, whether the Removal in this Case is to be considered in Nature of a Conviction, or an Order of Justices only; for if the latter, not necessary to set out the Evidence. In all Orders of Bastardy, the Evidence is never set out, and yet these may more properly be called Convictions than the present Case.

(287.) The King *v.* Rushworth.

Mandamus.

MANDAMUS to Bishop of *Litchfield* and *Coventry* to grant Licence to *John Rushworth* to teach School, he being appointed Under-Master of *Coventry* School, founded in Time of *Edw.* 3d. by *John Haines*. It was moved

moved to superſede *Mandamus*, this being a School of a private Nature within Statute of Uniformity, by which Biſhops had a judicial Capacity, and therefore this Court could not compel him.

Birch Serjeant, oppos'd this Motion, and ſaid, that teaching was *res mere laica*; that a School-Maſter is a Lay Employment, and was formerly under the Care of the Civil Magiſtrate, 2 *Salk.* 672. *Matthews* and *Burdett.* That no Law or Canon required a Licence till the Council of *Lateran*; that the Canons which made it neceſſary did not bind the Laity, becauſe never confirmed. That *Mandamus's* had been granted in Caſes of an inferior Nature, and in which the Publick was not ſo much concerned. 1 *Sid.* 107. *Mandamus* to make one free of a Corporation or Company, 1 *Vent.* 115. *Mandamus* to Eccleſiaſtical Court to swear Churchwardens elected by the Pariſh, 1 *Vent.* 187. To the Mayor and Aldermen of *London* to give Judgment upon *Stat.* 13 *Car.* 2. *c.* 11. 1 *Vent.* 335. To grant Probate of a Will under Seal after Refuſal by Executor, 1 *Vent.* 143, 153. *Ile's* Caſe. *Mandamus* to reſtore a Sexton. It was much doubted at firſt, becauſe ſaid to be rather a Servant than an Officer, or one that had Freehold in the Place: But upon Certificate that he held it for Life, *Mandamus* was granted. School-Maſter is a Perſon of publick Concern, and for that Reaſon a *Mandamus* ſhould go, 1 *Sid.* 169. To reſtore *M.* to the Place of Treaſurer of the *New River* Water, and *Mandamus* granted becauſe an Office

Office of publick Concern; and said in that Case that *Mandamus's* have been granted to restore Parish Clerks, School-Masters, Ushers, Fellows of Colleges, *&c.* *Mich.* 1 *G.* 2. *The King* and *Bishop of Litchfield.* Mr. *Lee* moved for a *Mandamus* to restore the School-Master of *Coventry*, and tho' that Case went off for Defect in Affidavits, yet the Court were of Opinion that a *Mandamus* would lie, and advised Mr. *Lee* to amend his Affidavit, *Pasch.* 13 *G.* 1. *Mandamus* to license a Lecturer, and tho' it was not granted in that Case, because a Suit was depending *in Scac'* concerning the Right, yet the Court seemed inclinable that a *Mandamus* would lie. Case of *Vincent* and *Bishop of London.* It appears by the Writ, that this is a publick School, and is called a Free Grammar School founded in the Reign of *Edward* the 3d. and the Master has a Freehold. In all Cases where a Person has a Temporal Right, the Law gives him a (288.) Temporal Remedy, and not sufficient for Bishop to say he has a judicial Capacity, but must shew the Reason of his Refusal. 1 *Lev.* 75. *Hurst's* Case, *Mandamus* to restore an Attorney; and in that Case agreed by the Court that *Mandamus* had been granted in Case of a School-Master, Parish Clerk, *&c.* because Offices of publick Concern.

Y. C. J. Whether *Mandamus* to license a School-Master will lie, has not yet been fully settled. It has been said, that a Licence not necessary; if so, the Application for a *Mandamus* is to no Purpose: For a *Mandamus* presupposes a Licence necessary, and is to compel

compel the Bishop to grant one. But it has been said likewise in Opposition to the Motion, that a *Mandamus* does not go, and the Remedy is by Appeal to the Metropolitan, but no Case cited to establish that Doctrine. In the Case of a Lecturer, *Mandamus* has been granted; and in the Case of *Vincent* and *Bishop of London* the Court did not refuse it upon the Merits, but because the Right was depending in *Scac' Mich.* 4 *Ann. Hollfat* and *Newcomb*. Said by *Powell*, if Bishops refuse to grant Licence to preach, upon the Act of Uniformity, *Mandamus* will go. In *Carth.* 464. it is held, that Ecclesiastical Court cannot punish a School-Master teaching without Licence, and in that Case a Prohibition was granted: But in 2 *Lev.* 222. which was a Suit in Ecclesiastical Court for teaching School without Licence, a Prohibition was prayed and granted *nisi*: But afterwards upon Argument, Consultation was granted. *Vide* 3 *Keb.* 855, *Cory*'s Case. In the principal Case, the Court granted the *Mandamus*, that this Point might be fully spoke to upon the Return.

The King *v.* Kempson.

Order of Sessions.

ORDER of Sessions to compel Defendant to maintain his Son's Widow by Virtue of 43 *Eliz.* This Order being brought into Court by *Certiorari*, Mr. *Abney* took two Exceptions. That by the Order it appears this Case came to the Sessions by Appeal, whereas the Jurisdiction is originally in them, The

The Statute does not extend to this Case, the Person to be provided for is the Son's Wife, and the Order is made upon the Husband's Father, which is too remote to lay any Obligation upon him to provide for her; and so was *The King* and *Munday*, *Pasch.* 5 *G.* 1. Order to maintain *Anne Gerram* Widow, *Munday's* Wife's Mother; and the Order was quashed: But admitting her to fall within the Description of 43 *Eliz.* yet by her own Act she has depriv'd herself of all Benefit she might have otherwise been intitled to from her Husband or his Relations. She is here said to have eloped from her Husband, and to be an Adultress; and so it was held in the Case of *Morris* and *Martin*, *Hil.* 12 *G.* 1. [1 Stra. 647], which was an Action against the Husband
(289.) for Necessaries sold to the Wife; and upon Evidence it appeared she had eloped, and was an Adultress; and though no Proof that Plaintiff had Notice of this from Defendant, yet *Raymond* C. J. held the Husband not liable.

Parker cont': It does not appear this came before the Sessions by way of Appeal, only said upon Appeal of Overseers, *&c.* against *Samuel Kempson*, but not said to be an Appeal from any original Order; and the Word *Appeal*, in this Case, means no more than the Application of the Overseers. As to second Objection, he said Defendant was clearly within the Statute, and bound to maintain his Daughter in Law, and cited 2 *Bulst.* 345, *Draper* married a Person whose Grandaughter was a Pauper, and the Question was, whether *Draper* should be obliged to give Maintenance

to

to the Child; and held that he was liable by the Statute: And so is 2 *Bulst.* 346. *Styles* 283. 1 *Keb.* 489. That notwithstanding she was an Adultress, yet the Marriage continues, and she has all her Right. *Salk.* 115.. *Cro. Eliz.* 508. *Moor* 605.

Y. C. J. It does not appear that this came before the Sessions upon Appeal from any Order, the Word Appeal may be used and construed in the Sense of a Complaint; but the great Objection is, whether the Father is obliged to maintain his Daughter in Law by 49 *Eliz.* The Charge of Adultery makes no Difference in this Case; for whatever Privileges she may deprive herself of by her own Act, that cannot turn to the Prejudice of the Parish, and bring a Charge upon them. The 43 *Eliz.* is made in Ease and for the Benefit of the Parish; for tho' natural Right obliged Persons to provide for their own Relations, yet there was no compulsory Law before this Statute: This Question has been under the Consideration of the Court before, *Hil.* 12 *Ann. Queen* and *Dutton.* Order of Sessions was to compel the Father to maintain his Son's Widow, and in that Case Serjeant *Chappell* took the same Objection that is now made, *viz.* that by the Death of the Son the Relationship fails; but the Court quashed the Order upon another Objection, because not said that Person upon whom the Order was made was of sufficient Ability. In the Case of *The King* and *Munday* [1 Str. 190], it was held, that the Statute only extended to natural Relations; and that Case was determined upon

Argument and full Consideration. The Cases in *Bulst.* and *Styles*, were at that Time considered; and *Pratt* said in the first Case in *Bulst.* that it was misprinted, and the Word *Not* omitted. For the Substance of the Case is, that he was not to maintain his Wife's Grandaughter. The Case of *Gerrard* (which is the other Case in *Bulstrode*) was not judicial Authority, but a private Opinion only of a Judge at his Chambers, and therefore at that Time the Court considered it as a *res integra*, and quashed the Order. This is a Case which comes up to the present Question, and (290.) so concluded that the Order should be quashed. *Page*, *Probyn*, and *Lee* of the same Opinion.

The King *v.* Weeks.

Information. INFORMATION in Nature of a *Quo Warranto* was moved for, to shew by what Authority *Weeks* acted as a Burgess of Corporation of *Calne*, in *Wiltshire*. Upon shewing Cause it was alledged, that Defendant had been illegally disfranchised, had applied to this Court for a *Mandamus*, by Virtue of which he was restored, and by the Return, his Restoration appeared to be by the whole Corporation, which was sufficient Authority to impower the Defendant to act. In Answer to this, a Record was produced in Court but not read, being a Judgment of *Ouster* against *Stephens* one of the Burgesses who voted for the Defendant's Restitution:

Cur': This Record is no Evidence, the Return

Return is by the whole Corporation, and by that it appears that *Weeks* was restored. It is not proper to examine by Affidavits, whether there was a Consent of the Majority. If the Return be false, the proper Remedy is against the Mayor. 2 *Salk.* 431, 432. It was then objected that *Weeks* was an Infant at the Time of his Election, and so the Election void. And so it was held *Hil.* 3 *G.* 2. *King* and *Duke of Bedford*, Governor of *Bedford* Levels, in which Case an Information was granted upon the same Objection. Answer: The Reason of that was, because he acted under Age, but Question is whether the Election be void. *March.* 40. An Infant may be Mayor, and in the Case of *Young* and *Taylor*; It was held that Corporation Acts by an Infant Mayor are good, and the Distinction made in these Cases is, where the Infant executes a judicial Authority, and where a Ministerial one. The Law for several Purposes takes Notice of the Age of Infants. He may contract Matrimony at the Age of 12. at 14 he may chuse his Guardian, at the same Age he may sue his Guardian by Soccage to account as Bailiff. So an Infant Papist must take the Oaths of Allegiance and Supremacy at the Age of 18, or he loses his Estate. 11 & 12 *W.* 3. *c.* 4.

Cur': Before we determine the Law in these Cases, it is proper an Information should go to try the Fact.

Brassey *v.* Dawson.

Bankrupt, Land-Tax. S. C. 2 *Str.* 976.

(291.)

J. S. Collector of the Land Tax became a Bankrupt, but before Commission was taken out, the Defendant by Virtue of a Warrant from the Commissioners of Land Tax took his Goods in Execution; the next Day a Commission of Bankruptcy was had, and Assignment made to Plaintiff, who has brought Trover against *Dawson*, who had the Goods in Execution as above. Upon trial, before *Raymond* C. J. two Questions arose, for Opinion of Court: Whether the Goods were bound from the first Act of the Bankruptcy, or from the Time of suing out the Commission. And 2dly, Whether the King's Prerogative was included within the general Rule. Serjeant *Darnell* insisted, that by Assignment the Assignee had a Property by Relation from the Time of the Bankruptcy. That this was a general Law and bound all Parties, and cited the Case of *Andrews* and Sir *Mathew Decker*. *Pasch.* 3 *G.* 2. 3 *Lev.* 69. 191. *Philips* and *Thompson*.

Serjeant *Eyre cont'*: Before Assignment the Property was not divested but remained in the Bankrupt. That Execution in this Case was in Nature of an Extent, at the Suit of the Crown, which cannot be defeated by any Matter *ex post facto*. That this was by Virtue of the King's Prerogative, who shall be preferred in his Debt; that this Prerogative is by the Common Law, and is not taken away or abridged by any Act of Parliament. That neither

neither Statutes Merchant nor Staple nor a Bankruptcy mention the King, and therefore he is not bound by them. 3 *Keb.* 14. Sir *W. Jones*, 203. *Awdley* and *Halsey*, and this appears plainly by 21 *Jac. c.* 19. which impowers Commissioners to proceed when Bankrupt by Fraud makes himself Accomptant to the King. In all Cases where the Crown is intitled, no Difference between an Extent and a Distress executed at the Suit of the Crown, and an Extent is of that Nature, that after it is once served, though not compleatly executed, yet it defeats all Mesne Acts done by the Conusor in the Interim. Sir *W. Jones* 202. It is true the Assignee in some Respects is in by Relation from the Bankruptcy, so as to avoid all Mesne Acts, but not so as to be actually invested with the Property. And of this Opinion was *Holt*, C. J. *Salk.* 111. He cited 3 *G.* 2. *fo.* 25. Goods bound in whatever Hands found, and the Act of Parliament which gave the Land-Tax had altered the old Law.

Darnell: The Prerogative does not come in Question in this Case, for Insufficiency of the Collector does not affect the Crown: The Parish, *&c.* remains liable, and the Statute gives them a Remedy against the Collector by subjecting his Estate in Satisfaction to them.

Yorke C. J. There are two Questions which arise upon Construction of this Case. Whether this is to be considered in the Case of a Private Person, or as a Case which concerns the King's Prerogative. If it is looked upon as the Case of a private Person, though Commissioners

Commiſſioners of Bankrupt have no Property in the Bankrupt's Effects, but only a Power to veſt them in the Aſſignee, yet after Aſſignment the Aſſignee has a Property from the very Time of Bankruptcy. Where Plaintiff ſues out Execution previous to any Act of Bankruptcy, and this Execution is compleatly executed, the Goods ſold and Money paid to Plaintiff, and after that there is an Aſſignment made, the Relation which it has to the Time of Bankruptcy ſhall not defeat all this. *Sed Quære* 3 *Lev.* 191. But where Execution is not compleated, but the Goods remain in Officers Hands, they are ſubject to the Commiſſioners of Bankrupts. In the preſent Caſe the Execution was not compleated, but the Officer was in Poſſeſſion at the time of the Aſſignment, and therefore if this Caſe was conſidered as between Party and Party only, the Plaintiff muſt have Judgment: But the ſecond Queſtion is a Caſe of much greater Conſequence, wherein the King's Prerogative is concerned. There is no Queſtion, but the Land Tax is the Property of the Crown, and after it is collected becomes in Point of Law the King's Money. The Power of diſtraining upon the Collector by a Warrant from the Commiſſioners, is a ſummary Remedy given by the Act of Parliament in favour of the Crown. But if this Method of Proceeding should be under the Controul of the Bankrupt's Act, it would put the Crown in a worſe Condition than it was before. For in Caſe of an Extent, the Goods are bound from the Teſte, and a Commiſſion of Bankrupts cannot

(292.)

cannot break in upon it, and this is with great Reason: For the Crown cannot come in upon the Bankrupt's Act and claim a Dividend. It is said that this Case does not affect the Crown, because the Parish remains liable; but that makes no Alteration in the Nature of this Case. It is the King's Money, and the Parish only remains as so many different Securities. *Vide* Case of *Cary* and *Crisp*. *Salk*. 108. and 1 *Vent*. 360. *Perry* and *Bowyer*. *Skin*. 30. *Cro. Car*. 149. *Show. P. C. Case* 72. 2 *Roll. Abr*. 157. *Hob*. 222.

The King *v.* Griffin.

Information.

INFORMATION was granted upon this Case; a Workhouse was erected at *Lambeth*, and the Government thereof vested in Trustees: Afterwards Disputes arising between them and the Parishioners, Defendants fixed up Notice in the Church purporting that Parishioners would meet on *Thursday* to consider of and inquire into the Management of the Workhouse. Upon this, the Trustees likewise fixed up Notice in the Church that the former Notice was not given by the Direction of the Trustees appointed by Vestry, and that the said Trustees designed to continue their Meetings on *Sundays* as usual. In answer to this, Defendants fixed up a third Paper, that notwithstanding the said Notice by the said Trustees, the Parishioners did intend to meet on *Thursdays* to enquire into the several Abuses permitted and suffered to be committed

(293.)

committed by Virtue of the pretended Authority of the ſaid Truſtees, and it was upon theſe laſt Words that the Information was grounded. The Caſe was afterwards tried and the Defendants found guilty. It was now moved in Arreſt of Judgment, and two principal Objections were taken. 1ſt, That the Matter contained in the Notice was not libellous; and 2dly, That the Manner and Form in which the Information was laid was not good. As to the firſt Objection, it was ſaid, that a Libel is a malicious Defamation of a Perſon of another, tending to blacken and aſperſe his Reputation. Here is no Charge of any particular Crime or Offence in this Information, all that is ſaid is, that ſeveral Abuſes were ſuffered and permitted, *&c.* which muſt neceſſarily happen where ſo many Perſons are intruſted with the Management of an Affair of ſo publick a Nature. The Management of the Workhouſe is an Affair which concerns the Pariſh, and therefore the Pariſh has a Right to enquire into all Abuſes: Abuſes may be ſuffered and permitted, and yet thoſe Abuſes not ſcandalous. The Statute provides that all Perſons receiving Relief from the Pariſh ſhall wear Badges. *Vide* 8 *&* 9 *W.* 3. *c.* 30. Suppoſing then a Perſon not wearing a Badge is relieved, this is an Abuſe, and yet ſurely ſuch an Abuſe is not infamous. As to the ſecond Point ſeveral Objections were made, Firſt, that there was only three Truſtees named in particular in the Information, *viz. E. Dawſon*, *R. Dawſon*, and *J. Theobald*, and all the reſt are mentioned generally, *et alii Fiduciarii*,

Fiduciarii, which is not sufficient; for in Informations of this Nature, not only Persons offending, but the Persons offended must be mentioned particularly. *Bro. Abr. Tit. Indictment, p.* 21. *Show.* 389, 390. *Carth.* 226. 2 *Leon.* 39. 2 *Lev.* 208. By the same Reason that three only may have an Information, all the rest may have separate Informations, and so create Multiplicity of Suits, and Defendants be punished *ad infinitum pro uno delicto.* 2dly, It is said they acted as Trustees, *&c.* but not shewn *quo jure*, as they ought to have done. *Alleyn* 78. For if they usurped their Authority, or were not *Legit' modo constituti*, they are not Trustees. 3dly, The *Stat.* 9 *G. c.* 7. which enables the Churchwardens and Overseers of the Poor with Consent of Parishioners in Vestry to erect Workhouses, gives them no Power to appoint Trustees, and of themselves, they cannot delegate such Authority. *Lane* 21. It is only alledged generally, that a Workhouse was erected, but does not shew how, whether by Consent of Parishioners or major Part of them: It does not appear that a Vestry was convened, nor that it was erected for Support and Maintenance of the Poor. But the last and principal Objection was, that it is not averred that the Persons mentioned in the Information, are the Persons described in the Notice: For the Notice upon which the Information is grounded, is relative to the Notice fixed up by the Trustees. For the Words are, notwithstanding such Notice fixed up by the Trustees aforesaid, which Words are relative, (294.)

viz.

viz. to the Truſtees appointed by Order of Veſtry, and the Truſtees in the Information are called Truſtees appointed by Conſent of the Pariſhioners: How then do theſe Truſtees appear to be the ſame? It ought to have been averred that they are the ſame, for the Court cannot intend them the ſame, be the Inference ever ſo natural; this was argued by Mr. *Hayward* as a fatal Objection. But notwithſtanding theſe Objections the Court unanimouſly gave Judgment for the Proſecutors.

Yorke, C. J. ſaid, There are two Objections made to the Information, that the Matter is not in itſelf libellous, the other is to the Manner and Form as laid in the Information. As to the firſt, that depends upon the Paper itſelf, and that appears to contain ſcandalous Matter and to be libellous; and this may be conſidered two Ways, either as to Perſons acting in a publick or a private Capacity. Where Perſons act as publick Magiſtrates, every Charge of Abuſe in the Execution of that Office is libellous. It is an Offence of a publick Nature, and does not only tend to a Breach of the Peace as reflecting upon their Perſons in particular, but is alſo a Reflection upon the Government, which eſtabliſhes and ſupports that Authority; but this is not the preſent Caſe. This does not appear to be a Workhouſe erected by the publick, and therefore muſt be taken to be a private Workhouſe erected by Charity, and the particular Government thereof veſted in Truſtees, but it being a Truſt of a private Nature does not alter the

the Offence; for any Charge of an infamous Nature against Persons acting in a private Trust is libellous, and tends to a Breach of the Peace likewise, and therefore Prosecutions of this Nature have always been encouraged to prevent that vindictive Method, which otherwise the Party injured might pursue in order to gain himself a Satisfaction. It is said indeed, that here is no particular Charge, but only that Abuses have been suffered and permitted: But this is in itself a Charge, and is aspersing the Trustees as the Cause and Instruments of such Abuses. It has also been argued, that the Defendants are Churchwardens and Parishioners, and therefore have a Right to enquire into the Abuses of the Parish, *&c.* No Doubt of it, and if the Case had been so, it might have required further Consideration, and would have been proper Evidence at the Trial: But nothing of this appears in the present Question, and we cannot intend them to be so. As to the second Point, it has been objected, that all the Trustees are not particularly mentioned. Here are three, *viz. E. Dawson*, *A. Dawson*, and *Ja. Theobald*, and if the Words following (*Et alii Fiduciarii*) had been omitted, yet the Information had been good. This indeed might have been an Objection in an Action upon the Case, but in Indictments and Informations which are at the Suit of the Crown, a Person cannot be punished twice; for a former Judgment may be pleaded in Bar to a Prosecution (295.) of the like Nature. The only Objection which seems to have any Weight is the last, but

but that has been fully answered by Mr. *Fazakerley*, for the *Fiduciar' prædict'*, is not relative to the Trustees described in the Notice, but to the Trustees before-mentioned in the Information, and there is that in the Information which amounts to a positive Averment; for the Words are *de et concernent'* the said Trustees, and though they are not exactly described in the Information in the same Manner as in the Libel, yet there is no seeming Inconsistency: For Trustees appointed by Vestry, must be Trustees appointed by Consent of Parishioners in Vestry, and so no Repugnancy or Contradiction in the Description. There was a Case cited by the Court, the Case of the *King* and *Horne*, *Trin.* 11. *W.* 3. which was an Information for publishing a Libel, called the Ladies Invention; this the Jury found to be a Libel, but against what Persons, was unknown, and the Court held that the Information was not good.

The King *v.* Inhabitants of Ripon.

Order of Removal.

THE Sessions discharged an Order of Removal brought before them by Appeal, and the Order of Discharge was in these Words.—It is ordered that the Order of Removal be discharged, without giving any Reason, or alledging it to be upon hearing of the Parties.

Cur': It appears this Order came to the Sessions by Appeal, which gives them an undoubted Jurisdiction; and there is no Necessity

ſity for ſetting out the Reaſon of their Judgment: We never do it in this Court, and therefore this Motion made by Mr. *Parker* was denied.

Darby *v.* Pool. Mich. 8 Geo. 2.

Debt upon Bail Bond.

ACTION of Debt upon a Bail Bond taken in the Marſhalſea Court, the Defendant craved *Oyer* of Condition only and not the Bond, and then pleaded *Stat. H.* 6. That no Sheriff, under Sheriff, or under Officer, *&c.* ſhould take a Bail Bond but in the Name of his Office, and then goes on, *&c.* and ſays that the Defendant being in Cuſtody, the Plaintiff took a Bond in the Name of *Burleigh.* Plaintiff replies, that at the Time of making the Bond he was Sub-marſhal, and then goes on and ſets forth by Way of Inducement, that the Bond was taken by *Burleigh vigore Statut.* and *ſecundum formam* and *Effectum*, *&c.* and then traverſes that the Bond was taken by *Darby modo et forma*, *&c.* and upon this Iſſue is joined, and Verdict for Plaintiff. It was now moved in Arreſt of Judgment, that the Bond was taken by *Darby* in the Name of *Burleigh*, whereas by the Expreſs Words of the Statute it ought to have been taken by the Officer in the Name of his Office.

(296.)

Mr. *Fazakerly* for Plaintiff: The Replication is good, the only Objection is to what is alledged by Way of Inducement, which is not material; the Defendant pleads that the Bond

Bond was taken out by *Darby* in the Name of *Burleigh*; this the Plaintiff traverses and denies its being by *Darby modo et forma*; this avoids the Fact which is alledged in the Defendant's Plea, and upon this Point the Parties were at Issue, and Jury found it for the Plaintiff. The Defendant in this Case craved *Oyer* of the Condition, by which Means the Plaintiff was deprived of the Benefit of setting out of the Bond, which otherwise he might have entered at large upon the Record, and by that Means he would have avoided the Defendant's Plea of the Statute, because then it would have appeared the Bond was taken in the Name of his Office, as in *Carth.* 301, 302. *Lutw.* 680.

Mr. *Denison cont':* The *Stat.* 23 *H.* 6. *cap.* 10. is set out and made Part of the Record, and it appears by the Statute, that the Bond must be taken in the Name of his Office, or otherwise it is void, but as the Bond is pleaded in this Case, it does not appear to be taken according to the Statute, and this Defect is not aided by Verdict; for where a Matter is of Substance and essentially necessary to be set forth, the Omission is not cured by Verdict, and to this Purpose he cited 2 *Saund.* 177. Supposing the Plaintiff should bring an Action of Covenant, and should not alledge sufficient Breach to intitle him to his Action, a Verdict will not aid him in that Case, but it shall be taken as a void Issue. The Issue is only here whether the Bond was taken by one Man or the other, but it doth not appear to be taken according to

to the Statute, and the Court cannot now intend it to be so taken.

Benny, pro Quer': There is no Objection to the Bond itself with Respect to its Form; the chief Objection is, that it was not taken in the Name of his Office, but this is sufficiently set forth in the Replication, for there the Plaintiff avers that he was an Officer and Sub-marshal of the Court, and that he took the Bond *secundum formam et effectum, &c.* and cited 1 *Lev.* 254. *Lenthall* and *Cooke*, 1 *Saund.* 156. 10 *Rep.* 100 *b.* Sir *William Drury*'s Case.

Raymond Chief Justice: The Replication in this Case is cured by the Verdict. The Defendant pleads the Statute, and that the Bond was taken by a third Person in the Officer's Name. This he traverses by setting forth he was Sub-marshal and took the Bond *vigore Stat.* and *secundum formam et effectum, &c. absque hoc*, and that he took it *modo et forma*. Though the Inducement to the traverse is short, yet it being after Verdict is aided by the Words *secundum formam, &c.* (297.) *Statut'*, which must imply he took the Bond in the Name of his Office. The Defendant should have craved *Oyer* of the Bond and then it would have appeared upon Record, how taken.

Probyn Justice: The Plaintiff in Replication hath followed Defendant's Plea, and traversed the Fact insisted upon by the Plea, and that is found for the Plaintiff. There is nothing set forth in the Inducement that destroys the Replication, and though it is not alledged

alledged so fully as might have been, yet is now cured by the Verdict; and the *secundum formam, &c.* implies that it was taken in the Name of the Office as the Statute requires.

Lee Justice: The Statute is here pleaded, and it must appear upon Record that the Bond was taken in the Name of his Office, and this is usually set out in the Declaration. Had the Inducement been out of the Case the Replication had been good, but the Inducement is now become a necessary Part of the Plaintiff's Replication, and the Court must take Notice of it. By this it appears by Plaintiff's Confession, that the Bond was taken by him as an Officer, and a Verdict cannot be found contrary to a Man's Confession; but the Plaintiff goes further and says, that the Bond was taken by him *secundum formam*, and traverses its being taken *modo et forma* as alledged by the Defendant; how far the *modo et forma* goes, and whether the *secundum formam, &c.* will give a Cause of Action is the Question. Supposing in this Case the Defendant had demurred this had been a good Objection. But the Court gave Judgment for the Plaintiff; *Lee dubitante.*

Mandy *v.* Mandy.

Fee in Reversion.

THE Case in Effect was no more than this. *Venterus Mandy* being seised in Fee of the Reversion of several Messuages expectant upon two several Terms for Years, out of which was reserved a Ground Rent of 29 *l.*

per

per Annum, and having several Sons and Daughters, devised to them and their Heirs severally, the several Rents of 6, 7, and 9 Pounds *per Annum*, issuing out of the Ground Rents. He likewise devised to his eldest Son 5 *l. per Annum*, and taking Notice in this Will of the Undutifulness of his first Son, declared it his Intentions, that he should take no more of his Estate than what was expresly devised to him; and whether the Reversion in Fee expectant upon the Lease for Years passed by this Devise to his several Children was the Question.

Serjeant *Baines:* If the Testator in this Case had devised the Rents and Profits of his Estate, that undoubtedly had been an equivalent to the Devise of the Lands themselves and the Reversion would have passed. But here the Rent only is devised, and therefore nothing shall pass but the Rent itself, for Rent is not a sufficient Word by the Statute of Wills to pass Lands by, and he cited *Moore* 640. *Derick* and *Kery*; but note this Case is reported *aliter* in the same Book *fo.* 771. and with this last Report agrees *Cro. Jac.* 104. But in the present Case the Testator hath not devised to his Children all his Rent, nor hath he given in express Terms the Ground Rent itself which might have been an Indication of his Intent, but he hath only given an annual payment issuing out of his Ground Rents, nor is the Rent in question reserved upon one single Demise, but issuing out of several Leases which have different Determinations. Besides here is no particular Rent devised, nor what House each Devisee shall have; so that should (298.)

the Reversion be construed to pass by this Devise, it will make great Confusion how to apportion. He likewise cited *Cro. Eliz.* 637, 651. *Moor* 549. 1 *Leon.* 315. He also said there was a Difference between a Rack Rent and a Ground Rent; a Rack Rent always includes the whole Profits, but a Ground Rent seldom includes a tenth Part.

Serjeant *Eyre cont'*: The Reversion in Fee expectant upon the several Leases will pass by the Devise for two Reasons; First, because it plainly appears to be the Intent of the Devisor, that the Inheritance should pass, and 2dly, because the Words themselves are sufficient and amount to a Disposition of the Reversion. The Intention of the Testator appears from the Words of the Will. *Item*, Concerning the Disposal of *all my worldly Estate*, my Will is, *&c.* These Words of themselves are sufficient to create a Fee. 2 *Vern.* 715. He likewise gives an express Estate to his eldest Son, and there are negative Words to shew his Intentions, that he should take no more than what was particularly devised to him. The Limitation to his Children is to them and their Heirs for ever, which is inconsistent with a determinable Estate, and therefore it must be his Intention, that the Reversion expectant upon the Leases should pass likewise. Secondly, He argued that the Words in themselves are sufficient in a Will to convey the Inheritance. By the Conveyance of a Rent at Common Law nothing passes but the Rent, but in Wills it is different, for the Statute of Wills does not

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tye a Man up to any set Form of Words, as Conveyances at common Law do, and therefore if a Man by Will conveys all his Estate the Reversion in Fee passes. So if a Man devises away all his Livelihood, all his Inheritance, *&c.* this is sufficient to convey over the Fee. *Owen* 30. 2 *Lev.* 41. 3 *Leon.* 165. *Styles* 178. And the Case in *Moor* 771, is a strong Case, that by a Devise of Rent the Reversion passes. This Case is mentioned in *Duke of Char' Uses* 72, and in *Cro. Jac.* 104, and the Circumstances of both Cases are alike; in both Cases a Rent is devised issuing out of a Term for Years. There the Words of the Will are, As to the Disposition of all my Lands and Tenements; here the Words (299.) are, As to the Disposal of all my worldly Estate; there an Estate for Life was given, and here it is to his Children and their Heirs for ever. It is held in 1 *Vent.* 322. that by a Devise of all his Rents, a Reversion expectant upon a Lease will pass, and so concluded, that first it appeared to be the Intent of the Parties the Reversion should pass, and 2dly, by a favourable Construction that is made of the Words of a Will, the Words are of themselves sufficient to carry the Reversion.

Raymond C. J. It appears to be the Intention of the Testator to dispose of his whole Estate, the Limitation is to the Children and their Heirs, which could not be if no more was to pass than the bare Rent, for that is determinable upon Leases. The Reversion in this Case cannot go to his elder Son, for he expresly excludes him from taking any more than

than the particular Estate devised to him. In Deeds it is necessary to make Choice of apt Words of Conveyance, but Wills are always taken favourable, and the Intent of the Testator is to be considered. *Probyn* and *Lee* of the same Opinion.

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